Law Reform Commission of Canada

Commission de réforme du droit du Canada

CRIMINAL LAW

the charge document in criminal cases

Working Paper 55

Canada

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Working Paper 55

THE CHARGE DOCUMENT IN CRIMINAL CASES

1987

Notice

This Working Paper presents the views of the Commission at this time. The Commission's final views will be presented in its Report to the Minister of Justice and Parliament, when the Commission has taken into account comments received in the meantime from the public.

The Commission would be grateful, therefore, if all comments could be sent in writing to:

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PREFACE

A Note concerning Terminology

The technical terminology which abounds in this area of the law can render this subject impenetrable to the general reader. We have attempted to alleviate this difficulty by providing, in Appendix A, a glossary of major terms. In addition, in order for our proposals to be properly understood, it is important that the reader have a relatively precise understanding of the way in which we use two terms which ordinarily require little or no explanation — ''offence'' and ''crime.''

In our Working Paper 54 entitled *Classification of Offences*[1] we proposed that all federal offences be classified either as ''crimes'' or ''infractions,'' with crimes being the true subject of the criminal law. Infractions, in our view, should not be dealt with in a Code of Criminal Procedure, but rather merit treatment in a separate enactment, perhaps an Infractions Procedure Act.

As a technical term the word ''offence'' is a generic label which captures both crimes and infractions within its ambit. Thus, in our reform endeavours its use can be either ambiguous or positively misleading. For this reason we have eschewed its usage in the drafting of recommendations or legislation. ''Offence'' however is a term which enjoys widespread colloquial use, and within the present law it even has technical uses which defy its ready eradication or replacement by the term ''crime.'' Such is the case, for example, in the ''doctrine of included *offences*,'' or in the objection to pleadings which contends that the charge contains ''no *offence* known to law.'' While we seek to be precise in our use of language, our aim is not to purify the language whatever the cost. Thus, while our proposals and draft legislation consistently employ the term ''crime,'' the reader will encounter a liberal sprinkling of the word ''offence'' throughout the commentary to this paper. We trust that the purist will not ''take offence.''

1. Law Reform Commission of Canada [hereinafter LRCC], *Classification of Offences* (Working Paper 54) (Ottawa: LRCC, 1986) c. 4.

CHAPTER ONE

Introduction

I. Nature and Purpose of the Criminal Charge

An accusation of a crime lodged against an accused is one of the most serious steps our society can take against an individual. The mere fact of being charged can have enormous repercussions on the accused's life. The importance of this decision is recognized in a number of doctrines in criminal procedure, including the necessity for an independent judicial arbiter interposed between the police and the accused. The importance of this decision also has implications for the drafting of criminal charges.

Thus, we require a charge to be in writing, so that vague or unspecific allegations against a person cannot take the form of gossip through the community: a written document setting out the matter in black and white must exist. Secondly, such an allegation must be founded on oath. In the case of an information (one of two kinds of charge documents which are used), this is an oath sworn before the justice before a summons or warrant issues. Even indictments (the other charge document) were in the past founded on the oath taken by a grand jury. Modern indictments, since the abolition of the grand jury, can be viewed as founded on the oath involved in the information which preceded them and on which the indictment is founded, or the oath of the Attorney General who prefers an indictment without preceding information, or the oath of a judge who orders or consents to preferment. Furthermore, the importance of a criminal accusation has implications for the procedure followed in its trial. Thus, the prosecution has the burden of proving the allegations beyond a reasonable doubt. A criminal trial is not a general inquisition into the relative goodness of an accused and his actions, but rather has a specific focus: the charge document which the prosecution must prove, or else fail in its endeavours. Matters extraneous to the specific accusations in the charge document, though they may speak volumes concerning the accused's character, and even because they do, are excluded from admission in the trial, so that only the written allegations in the charge document are considered. All this is a reflection of the gravity of charging a person with a crime. Thus, the importance of our rules of criminal pleading becomes self-evident.

A criminal charge document can be seen to have four distinct purposes: first, a notice function, notifying of the existence of the prosecution and its nature; secondly, a

litigation function, in defining issues between the parties; thirdly, an evidentiary function, in controlling the admissibility of evidence and other matters via the doctrine of relevance; and fourthly, an historical or record function, recording the particular case determined, for such subsequent proceedings as new charges, escalating penalties for subsequent convictions, appeals, motions and applications or other civil or disciplinary proceedings.

There is a remarkable degree of unanimity concerning the formal requirements for drafting criminal charges. The topic on which there is unanimity, unfortunately, is dissatisfaction with the present state of the law. In terms of the principles and policies that should guide our system of criminal procedure, the law in this area is perceived as failing on all counts by all concerned.

Mr. Justice Dickson sounded a similar refrain in *R.* v. *City of Sault Ste. Marie*, where in the context of a discussion of the drafting rules prohibiting multiplicity and duplicity, His Lordship stated:

> The rule developed during a period of extreme formality and technicality in the preferring of indictments and laying of informations. It grew from the humane desire of judges to alleviate the severity of the law in an age when many crimes were still classified as felonies, for which the punishment was death by the gallows. The slightest defect made an indictment a nullity. That age has passed. Parliament has made it abundantly clear in those sections of the *Criminal Code* having to do with the form of indictments and informations that the punctilio of an earlier age is no longer to bind us. We must look for substance and not petty formalities.[2]

Any system governing the drafting of criminal charges should be efficient, effective, just and fair. This reflects the fact that any system of procedure must ensure the effective apprehension and trial of persons accused of crimes, while at the same time maintaining fairness in administration and securing the just determination of every criminal proceeding. Flowing from this are other important values, notably simplicity and clarity.

Attaining simplicity in procedure must be an important goal in the reform of criminal pleadings. The rules of criminal pleading should be as simple and clear as possible, and consistent with the other principles mentioned. In this way public respect for the law is nurtured.

However, insofar as the present law is concerned, a perception of unfairness arises concerning what many defence counsel describe as a routine lack of factual information in criminal charges, especially in crimes such as fraud or conspiracy involving complex factual allegations. The prosecution is presently not required to specify the statutory sections under which the accused is charged.

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2. *R.* v. *City of Sault Ste. Marie* (1978), [1978] 2 S.C.R. 1299 at 1307, 40 C.C.C. (2d) 353 [hereinafter *Sault Ste. Marie* cited to S.C.R.].

The following typical examples of charges will illustrate these points:

(1) ... at the City of Vancouver between the 15th day of April, A.D. 1984 and the 10th day of June, A.D. 1984, unlawfully did conspire and agree together and with each other and with other persons unknown to defraud the public by fraudulent means contrary to the *Criminal Code*;

(2) ... at the City of Sudbury in the District of Sudbury, between the 1st day of January, 1984 and the 15th day of November, 1985, unlawfully did traffic in a narcotic, to wit, *cannabis marihuana*, contrary to the *Narcotic Control Act*.[3]

Crown attorneys, by contrast, often perceive unfairness in the routine quashing of serious charges for technical omissions. Clarity, it is said, is impossible in the face of doctrines such as "nullity" and "essential averments." The search for simplicity is undercut by special sections of the *Criminal Code* containing special procedural rules for particular offences.

In terms of efficiency or effectiveness our current law of criminal pleadings would be rated poorly. Many critics of this arcane subject are fond of pointing out the unfortunate common law ancestry of the present law (a subject summarized under heading III of this chapter). Thus, there is substantial need for reform in this area.

II. Principles of Reform

As mentioned, the challenge of producing simple, clear rules to govern or regulate the drafting of criminal charges is complicated by the need to balance and accommodate the demands of efficiency and effectiveness with justice and fairness. This task, a complex one within those parameters, must, in addition, be achieved within the context of the adversary system — the hallmark of the Canadian trial process. In our 1974 Working Paper on *Discovery* we described that system as follows:

> While the expressions "adversary" (or "accusatorial") and "non-adversary" (or "inquisitorial") are sometimes used in a variety of senses and while it is not always clear which sets of features are determinative of either system, there is an opposition between them which fixes the essential characteristics of each system. The fundamental matrix of the adversary model is based upon the view that the proceedings should be structured as a dispute between two sides — in criminal cases, between the prosecution representing the State and the accused — both appearing before an independent arbiter, the court, which must decide on the outcome. Flowing from this matrix the dispute depends upon the parties for the determination of the issues in dispute and for the presentation of information on those issues. Thus the protagonists of the model have definite, independent, and generally conflicting functions. In drawing the charge or in reviewing a charge laid by the police, the

3. See generally, Eugene G. Ewaschuk, *Criminal Pleadings and Practice in Canada* (Aurora: Canada Law Book, 1983) at 206-12.

prosecutor determines the factual propositions he will attempt to prove and then marshalls the evidence in support of them. Further, should the accused dispute the charge, the prosecutor has the burden of presenting the evidence in court, and the burden of persuasion in proving the factual propositions. The accused, on the other side of the dispute, decides what position will be taken in respect to the charge, whether one of admitting or disputing it, and if the latter, the accused then decides which factual contentions will be advanced and then presents the evidence in support of them. In the middle of the dispute the adjudicator's role is that of an umpire seeing to it that the parties abide by the rules regulating the contest, and then at the end he determines the right and proper decision. Although at some points this description may seem an over-simplification, emerging from it as essential characteristics of the adversary system are the relatively active roles of the parties in preparing and presenting the dispute and the relatively passive, independent, and impartial role of the court.

By contrast however, in the alternative, inquisitorial system the decision-maker independently investigates the facts, or has them investigated and prepared for him, and the proceedings are not conceived of as a dispute but as an official and thorough inquiry. Such proceedings are incompatible with the structuring of issues by the parties; indeed parties in the sense of independent actors are not needed.

Once again, while this description may seem over-simplified, what emerges as the essential characteristic of the non-adversary or inquisitorial system is the reliance on the active role of the judge and the relatively inactive role of the parties — in contrast with the adversary model. Thus the core of the opposition between these two systems lies in the alternative ways of conceiving of the adjudicator's role in pursuing the facts: judicial independence and passivity, relatively speaking, in contrast with judicial activity.[4]

Proceedings modelled on the adversary system thus involve a dispute between two sides appearing before an independent arbiter who decides the outcome. The parties are primarily responsible for determining the issues, the evidence and the arguments, with the court playing a relatively passive role, ruling on issues that arise and generally directing the proceedings based on the issues between the parties. The importance of the charge document in directing those issues and serving as the foundation for decision making by all the parties in a criminal proceeding becomes obvious.

The fundamental right of the accused to make full answer and defence is thus essentially a declaration of the rights of one of the adversaries within our system.

Also relevant is the following provision of the *Canadian Charter of Rights and Freedoms*, which gives some of these concerns a constitutional dimension:

11. Any person charged with an offence has the right

(*a*) to be informed without unreasonable delay of the specific offence; ...[5]

An early *Charter* case[6] interpreted paragraph 11(*a*) and, by its ruling on that section, appears to elevate the requirement of fair notice in charges, now found in

4. LRCC, *Discovery* (Working Paper 4) (Ottawa: Information Canada, 1974) at 7-8.

5. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11, s. 11 [hereinafter *Charter*].

6. *R.* v. *Lucas* (1983), 6 C.C.C. (3d) 147 (N.S.C.A.).

section 510 of the *Criminal Code*,[7] to constitutional status under paragraph 11(*a*). In a non-*Charter* case, the Supreme Court of Canada articulated the "golden rule" of criminal pleading that the accused be "reasonably informed of the transaction alleged against him, thus giving him the possibility of a full defence and a fair trial."[8]

The value of fairness which underlies these statements is obvious. At the same time, there is a utilitarian aspect highly relevant to the efficiency of the system: having two fully informed sides who are able to plan fully in advance and present their cases to the best of their ability promotes, at least in theory, a trial outcome which accords most often with the truth of the matter. Such is the theory of the adversary system, and the procedural requirements concerning criminal charges are essential to the successful implementation of that theory in the real world.

In the balance of this paper we seek to apply this analytical framework to the task of reforming the present law of criminal pleadings. For example, it is possible to argue that efficiency requires that there be a substantial amount of information in the criminal charge document prepared by the police or Crown prosecutor. Fairness to the accused points in the same direction. Nevertheless, there is a point beyond which requiring additional information in a charge becomes an unfair burden on the Crown, and a danger to the interests of simplicity and clarity. The interest of efficiency may itself be threatened by rules which promote diminishing returns. Thus, our goal must be to fashion rules which provide the proper level of specificity in charge documents, rules that will not err in one direction or the other.

Efficiency also requires substantial corrective powers, so that mistakes do not generally nullify the prosecution and waste the time and effort previously expended. Again, the countervailing consideration is fairness to the accused. Further, the rule decided upon as striking the proper balance must be capable of being clearly expressed and simply applied if the system is to be a success.

These issues require examination. First, however, a brief historical discussion will demonstrate how and why we find ourselves in the present unsatisfactory situation, and will help illuminate the best road to reform.

III. A Note on the History of Criminal Pleadings

The charge document in criminal cases at common law was a form of "special pleading" and accordingly, there were special rules for virtually all cases. As a matter of practice, indictments were prolix. Relatively simple offences often gave rise to numerous counts, each asserting the same offence, with some relatively minor

7. R.S.C. 1970, c. C-34 [hereinafter *Criminal Code*].

8. *R.* v. *Côté* (1977), [1978] 1 S.C.R. 8 at 13, 33 C.C.C. (3d) 353 [hereinafter *Côté* cited to S.C.R.].

differences in detail. Virtually no power existed in the court to amend or correct a deficient charge, because an indictment was conceived as the product of the grand jury functioning under its oath. Only purely formal matters could be changed, and even then only with the consent of the grand jury. The theory was that since the grand jurors were the true accusers, they alone had the power to amend a defect in their accusation.[9] Duplicity, the technical fault in criminal pleading of uniting two or more offences in one charge or count of an information or indictment, was a cardinal error. The rule against duplicity was justified on two grounds: to be fair to the accused in the preparation of his defence, and to enable him to plead one of the special pleas in the future.[10] Many prosecutions were aborted owing to relatively minor objections of a highly technical nature.

The common law system of criminal law proceedings was not without severe critics. In the eighteenth century, Lord Hale was quoted as stating that the great strictness required in indictments had "grown to be a blemish and inconvenience in the law and the administration thereof; more offenders escape by the over easy ear given to exceptions in indictments than by their own innocence." He stated further that "it were fit, that by some law this over-grown curiosity and nicety were reformed, which is now become the disease of the law, and will, I fear, grow mortal, without some timely remedy."[11]

Although there were some earlier efforts at reform, the first major procedural reforms in this area occurred in 1851 with the passage of *An Act for Further Improving the Administration of Criminal Justice*.[12] Its draftsman, Charles Greaves, authored a treatise in which he observed that the Act established two great principles: "First. That it is right that *wherever upon a trial a variance happens to occur in a matter of fact not evidenced by any writing, such variance ought to be amended* .... The other principle is, that *Indictments ought to be in the plainest and simplest form.*"[13] With a view to avoiding the common law rules specifying how offences were to be pleaded which resulted in very prolix indictments, the Act provided that the omission to plead certain matters with respect to such offences was not objectionable. Finally, the Act provided that any objection to a formal defect apparent on the face of the record must be taken before a plea.

Although these reforms represented considerable advances over the position at common law, Sir James Fitzjames Stephen, the famous codifier, noted certain shortcomings. Most notably he observed that the Act, while removing many of the

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9. See Roger E. Salhany, *Canadian Criminal Procedure*, 4th ed. (Aurora: Canada Law Book, 1984) at 226.

10. See *Sault Ste. Marie*, *supra*, note 2 at 1308. Dickson J. went on to describe (at 1308) the second rationale as "illusory," and turned the first rationale into the exhaustive test for duplicity:

> In my opinion, the primary test should be a practical one, based on the only valid justification for the rule against duplicity: does the accused know the case he has to meet, or is he prejudiced in the preparation of his defence by ambiguity in the charge?

11. In Thomas Starkie's *A Treatise on Criminal Pleading*, 2d ed. (London: Clarke, 1828) vol. 1 at 240.

12. (U.K.), 14 & 15 Vict., c. 100, known as *Lord Campbell's Act*.

13. Charles Greaves, *Lord Campbell's Acts* (London: W. Benning, 1851) at ii–iii.

previous technicalities, "... did so by an enumeration of them, so technical and minute, that no one could possibly understand it who had not first acquainted himself with all the technicalities which it was meant to abolish."[14] Stephen concluded that:

> The effect of these complicated and narrowly guarded amendments was to leave the greater part of the law relating to indictments in a blurred half-defaced condition, like a slate the greater part of the writing on which has been half rubbed out. They added greatly in one sense to the intricacy of the law, for nothing can be more intricate than a system of unwritten rules qualified by numerous written exceptions.[15]

The next significant advance (although a theoretical one as far as the English were concerned) is found in the *English Draft Code* of 1879 prepared by Stephen.[16] Stephen perceived his Code (which was later to be adopted in Canada) as having the capacity to "sweep away completely all the technicalities as to indictments, which have been half effaced already."[17] Such reformation was to be "effected by a series of sections, which stated shortly, but in positive terms, what the requisites of an indictment were to be, and then declared negatively that no one of the old objections should be made to them." A provision relating to the form and content of counts proposed that "[e]very count of an indictment shall contain and shall be sufficient if it contains in substance a statement that the accused has committed some offence therein specified," and that such statement "may be made in popular language without any technical averments of any allegations of matter not essential to be proved ...."[18] It states further that:

> Every count shall contain so much detail of the circumstances of the alleged offence as is sufficient to give the accused reasonable information as the act or omission to be proved against him, and to identify the transaction referred to: Provided that the absence or insufficiency of such details shall not vitiate the count, but the Court may order an amendment or further particulars, as hereinafter mentioned.[19]

A new section to alternative offences (section 483) provided that:

> A count shall not be deemed objectionable on the ground that it charges in the alternative several different matters acts or omissions which are stated in the alternative in the enactment describing any offence or declaring the matters acts or omissions charged to be an indictable offence, or on the ground that it is double or multifarious: Provided that the accused may at any stage of the trial apply to the Court to amend or divide any such count on the ground that it is so framed as to embarrass him in his defence.[20]

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14. Sir James Fitzjames Stephen, *A History of the Criminal Law of England*, vol. 1 (1883; reprint ed., New York: Burt Franklin, 1964) at 285.
15. *Ibid.* at 286.
16. Sir James Fitzjames Stephen, *English Draft Code*, Report of the Royal Commission Appointed to Consider the Law Relating to Indictable Offences with an Appendix Containing a Draft Code Embodying the Suggestions of the Commissioners (London: HMSO, 1879) [hereinafter *English Draft Code*].
17. *Supra*, note 14 at 511.
18. *Ibid.*
19. *Ibid.*
20. *Ibid.* at 512.

The intended effect of these provisions was to simplify indictments and to obliterate duplicity as a fatal pleading defect. The *English Draft Code* also provided an expanded basis for amendment (in sections 488 and 495) where there appears a variance between the charge in any count in the indictment and the evidence adduced, if the court is of the opinion that the accused has not been misled or prejudiced in his defence.

Further, if in the indictment there appears:

> ... an omission to state or a defective statement of anything requisite to constitute the offence, or an omission to negative any exception which ought to have been negatived, but that the matter omitted is proved by the evidence, the Court before which the trial takes place, or the Court of Appeal, if of opinion that the accused has not been misled or prejudiced in his defence by such omission, shall amend the count by inserting in it the matter omitted.[21]

These reforms were adopted in Canada with the enactment of *The Criminal Code, 1892*[22] which for most purposes, incorporated the *English Draft Code*'s pleading provisions including the provision which removed duplicity as a fatal pleading defect. The amendment powers were the same as set out in the 1879 *English Draft Code*. The 1906 *Criminal Code*[23] continued these provisions, as did the 1927 *Criminal Code*.[24] It is interesting to observe that the 1906 *Code*, in dealing with summary conviction offences, provided in section 724 as follows: "No objection shall be allowed to any information, complaint, summons or warrant for any alleged defect therein, in substance or in form, or for any variance between such information, complaint, summons or warrant and the evidence adduced on the part of the informant or complainant at the hearing of such information or complaint." It then provided a remedy of adjournment if the accused were misled by any of these matters. This provision was continued in the 1927 *Code*, but was not carried through in the 1953-1954 revisions. The reference to "form and substance" and the absence of limitations in the area of variances, made this provision the most far-reaching of its time.

The 1953-1954 revisions to the *Criminal Code*,[25] namely, sections 510 and 704 (now sections 529 and 732), brought significant changes to the amendment powers, enlarging these in the case of indictable offences and reducing these in the case of summary conviction offences.

On a consideration of the plain words of section 529 of the present *Criminal Code*, there would appear to be no defect incapable of amendment. Those which appear on the face of the record can be amended and those which develop at trial, both of form and substance, can also be amended. One would have thought that the process of

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21. *Supra*, note 16, s. 488.
22. S.C. 1892, c. 29 [hereinafter 1892 *Code*].
23. S.C. 1906, c. 146 [hereinafter 1906 *Code*].
24. S.C. 1927, c. 36 [hereinafter 1927 *Code*].
25. S.C. 1953-54, c. 51.

reform had ended. However, notwithstanding the many improvements made by the *English Draft Code*, the pleading rules have spurred a tangle of jurisprudential undergrowth. The amendment provisions have never been given full effect; controversies continue to arise at the present time, and matters of first importance still command the attention of the courts.

This situation has developed for a number of reasons. One of these is that the provisions introduced to alleviate problems which the common law rules created have sometimes been ignored. The best example is perhaps section 519 of the *Criminal Code* which provides that a count is not objectionable by reason only that it charges in the alternative several different matters, or is multifarious, although an accused may apply at trial to divide such count on the ground that it embarrasses him in his defence. Notwithstanding this provision, in countless cases duplicitous indictments have continued to be declared void. Many of these cases have made no reference to section 519. As well, some of the cases are based on English decisions, but ignore the fact that an equivalent of section 519 is not to be found in the English *Indictment Rules, 1971*.[26] Many cases have also failed to note that decisions dealing with summary conviction matters were also not on point because there was no equivalent to section 519 in the summary conviction provisions. Lastly, those cases which recognize the existence of section 519 have confused the single transaction requirement in section 510 with the provisions of section 519.

It is more difficult to ascertain the reason why the amendment provisions have never been given their full force and effect. It may simply have been the result of the fact that the amendment provisions were only broadened gradually. The courts, in dealing with the earlier, more limited amendment provisions, continued to recognize the concept of "nullity." The term literally means a "nothing," no proceeding, an act or proceeding which is taken as having absolutely no legal force or effect, as though it had never taken place; it also refers to a charge document as being as meaningless as a blank piece of paper by virtue of the omission of certain matters from its wording. In light of section 529 of the *Criminal Code*, there is no statutory basis for this doctrine. The court may, in its discretion, refuse an amendment. The reason for doing so, one would have thought, should be grounded in some irremediable prejudice to the accused rather than in the opaqueness of "nullity." Nevertheless, Chief Justice Laskin's dissenting decision in *Elliott* v. *R.*,[27] concurred in by Spence J. and Dickson J., at several points recognizes that nullities continue to exist.

Elliott was a case a layman would describe as centred on "technicalities." The accused was charged with several serious drug offences alleged to involve the drug MDA. The evidence, however, was said to disclose only the commission of those offences in respect of "a *salt* of MDA" [emphasis added], a substance equally prohibited under the relevant statute, the *Food and Drugs Act*,[28] and the accused was

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26. *Indictment Rules, 1971*, S.I. 1971, No. 1253.

27. *Elliott* v. *R.* (1977), [1978] 2 S.C.R. 393 [hereinafter *Elliott*].

28. R.S.C. 1970, c. F-27.

acquitted. The British Columbia Court of Appeal held that it did constitute a different offence for the accused to traffic in a salt of MDA, but allowed an amendment to the charge and ordered a further trial of the accused on the amended charge. The majority of the Supreme Court of Canada upheld that decision, which it characterized as adding a particular to the count. In the opinion of the court the ends of justice required the amendment. Moreover, the accused could not be said to have been prejudiced in any way since throughout the proceedings he had known the case he had to meet.

Chief Justice Laskin, dissenting, stated: "[I]t is established — and a recent illustration is seen in *R.* v. *Vallée* — that a charge or an indictment which fails to disclose an offence, one which is a nullity, is not amendable by the trial judge even given the wide powers of amendment reposed in him by s. 529, ..."[29] At an earlier point, he had noted: "It is, of course, the fact that, with the power given to a trial judge to amend to add an omitted essential averment, the line between a charge which is a nullity and one which is merely imperfect has become more difficult to draw."[30] No one doubts that our liberty should only be interfered with in accordance with law. Permitting amendments which do not prejudice the accused, thus permitting criminal disputes to be decided on their merits and not on procedural mistakes, cannot be opposed on any civil libertarian grounds.

R. v. *Vallée*,[31] the case relied on by Laskin C.J.C. to justify the continued existence of the "nullity" doctrine, involved a charge drafted to read "unlawfully driving while impaired by alcohol or a drug." The offence of impaired driving, accurately charged, requires an allegation that the accused's *ability to drive a motor vehicle* was impaired by alcohol or a drug. The proceedings were by way of summary conviction. Tysoe J.A. for the court held that:

> It follows that if a man or a woman is tried for an offence which is not known to the law, the proceedings are a nullity and the conviction, if there be one, is bad. In my opinion this is so whether or not objection is taken to the information before or after the accused pleads. In such cases more is involved than mere defect in the information, either in form or substance. The information is bad in law. If, as I hold, the Judge or Magistrate cannot act upon an information which charges an offence not known to the law, I fail to see how it can be said he has power to amend it to make it good.
>
> ...
>
> An information which does not charge an offence known to the law is, in my opinion, for the purposes of the criminal law, a nullity — a mere nothing, and no Magistrate or Judge can act upon it.
>
> ...
>
> One cannot breathe life into a nullity. With respect, I do not think this Court can do so. In my view, it cannot, by anything it might do, remedy the lack of jurisdiction *ab initio*.[32]

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29. *Supra*, note 27 at 415.

30. *Ibid.* at 412.

31. *R.* v. *Vallée* (1969), [1969] 3 C.C.C. 293 (B.C.C.A.) [hereinafter *Vallée*].

32. *Ibid.* at 307, 310 and 314 respectively.

These strong words are based on older precedent and ignore the modern *Criminal Code* provisions. Also, they are nullified to a large extent by the concluding paragraphs of the judgment:

> If I am wrong in the views I have expressed and the information is not a nullity, and was amendable ..., and if this Court has the same powers of amendment in an appeal ..., I would not, in the circumstances existing here, make any amendment.
>
> ...
>
> At no stage of the proceedings in the lower Courts did the Crown seek an amendment. It stood on the proposition that this is a case of a material averment imperfectly stated and so no amendment was necessary, a proposition with which I cannot agree. The conviction must be quashed unless it and the information are amended to include therein the essential averment that is missing. In my opinion in the circumstances existing in this case it would be a substantial wrong towards the respondent if this Court were to accede to the Crown's request, and I would not accede to it.[33]

Nevertheless, as shown by Laskin C.J.C.'s reliance on *Vallée*, these concluding words have been largely overlooked.

The Supreme Court of Canada, itself a transgressor, has pointed out the insufficiently appreciated significance of the 1953-1954 amendments to the *Criminal Code*:

> In their present form, these texts [sections 732, 755] were introduced by the amendments of 1953-54 (the numbers were then ss. 704 and 727). The previous enactments were somewhat different. For that reason, judgments rendered on the prior legislation should be used with great care.[34]

The recent case of *Morozuk* v. *R.* involved a charge of being "unlawfully in possession of a 'narcotic, to wit: *Cannabis* (marihuana),' for the purpose of trafficking";[35] but the Crown's certificates had proved the narcotic was *cannabis* resin. Lamer J. held for the court, that "[t]he gravamen of the offence is the possession of a narcotic for the purpose of trafficking."[36] It is an offence to possess cannabis and its derivatives, because these are narcotics. Particularization of the narcotic as one substance and proof of it as another simply means the Crown should have applied to amend the count to correct the variance. The Crown having failed to so move, the trial judge by his own motion could have made the necessary amendment. There was no prejudice to the accused, who was not misled in any way. There having been no amendment in the courts below, the Supreme Court acting under subparagraph 613(1)(*b*)(i) and subsection 613(3) of the *Criminal Code* amended the indictment by deleting the word "marihuana" and inserting "resin," and dismissed the appeal.

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33. *Ibid.* at 314.

34. *Côté*, *supra*, note 8 at 12.

35. *Morozuk* v. *R.* (1986), [1986] 1 S.C.R. 31, 24 C.C.C. (3d) 257, 50 C.R. (3d) 179 [hereinafter *Morozuk* cited to S.C.R.].

36. *Ibid.* at 31.

The court also clearly pointed out in *Morozuk* that if there had been "irreparable prejudice," there could have been no amendment, and an acquittal would have resulted.

It is apparent that law reform efforts in this area have sought for more than one hundred years to achieve a situation where criminal trials are resolved on their merits and are not decided upon technical mistakes. It is now manifest that for this result to be achieved, an overhaul of our criminal pleading rules is required. This is not the first time that such a call has been heard.

Mr. Justice Dickson sounded a similar refrain in *Sault Ste. Marie*,[37] where in the context of a discussion of the rule against multiplicity and duplicity, he proclaimed the obsolescence of our approach to pleadings, describing the reliance upon formal compliance as "the punctilio of an earlier age" that "is no longer to bind us." He concluded his admonition by stating that "[w]e must look for substance and not petty formalities."[38]

37. *Supra*, note 2.

38. *Ibid.* at 1307.

CHAPTER TWO

Recommendations for Reform

I. The Charge Document

RECOMMENDATION

1. A single document, called a "charge document," should be employed throughout the process. The use of the terms "information" and "indictment" should be discontinued. The *Criminal Code* should have a provision identifying and defining the attributes of a charge document and its application.

Comments

The present system contemplates two types of documents: the information, which exists in the provincial court, and the indictment, which exists in the trial courts above that level (except in Québec where the indictment also exists in the Provincial Court and the Court of Sessions of the Peace). All proceedings, both summary and indictable, are commenced by an information, except where an accused is directly indicted at the instance of the Attorney General, a relatively rare proceeding.

An information is the formal accusation that launches most criminal proceedings. It can follow or precede the process that brings an accused before the court. An accused may be arrested when he is found committing or is believed by a police officer to have committed an offence, and the information will be sworn following arrest in the course of processing the accused at the police station or in the court building prior to first appearance before a justice or judge. Sometimes, where the police decide that an offence has been committed and the accused is not immediately at hand, the information is sworn first, and then process issued by the justice in the form of an arrest warrant or a summons, which thereafter secures the accused's presence in court.

Both informations and indictments can charge more than one offence, each in a separate count (like a separate paragraph); as well, several accused can be jointly

charged in an information or indictment, or in a count. An information is sworn under oath by an informant; an indictment is not, but is signed by Crown counsel. Otherwise, in theory there are no significant differences between their contents. In practice there is one further contrasting feature: the information is usually drafted by a police officer; indictments, by a Crown attorney, except in Québec where all charging documents are authorized and drafted by the office of the Crown attorney, save those dealt with in municipal court. The same requirements of sufficiency are, in theory, applied to both.

In our Working Paper 54, *Classification of Offences*,[39] we have recommended the eradication of the distinction between offences triable on summary conviction and indictable offences. With the removal of this distinction, a large measure of the justification for the retention of two different charging documents disappears. A single charge document can easily do the work which is presently assigned to two, thereby avoiding needless complexity. The benefits of such a change will also be more fully felt once we have brought forward our work on jurisdiction of courts and moving cases up to trial.

The change which we are advocating here is a relatively modest one: we envision the new "charge document" (so-called) shouldering the same burden that is presently assigned to the indictment. Thus, a new charge document would be "preferred" at the completion of a preliminary inquiry, one containing the charge or charges upon which the accused has been committed to stand trial. Similarly, for present purposes that procedure which is now spoken of as the direct or preferred indictment will be replaced by a direct or preferred charge, although we do not preclude recommending changes to this procedural power in our forthcoming study on powers of the Attorney General.

A comprehensive Code of Criminal Procedure should have a section identifying and defining the charge document and outlining its contents and field of application. However, in advocating a single charge document we would hasten to add that greater involvement of Crown attorneys in drafting all charges should be encouraged. A standard format for the document could be developed by Crown attorneys with the aid of word processing; this would simplify drafting. If all charges were drafted with the same care and concern as is evident in the present drafting of indictments, many of the needless and obvious drafting errors presently made would be eliminated.

39. *Supra*, note 1.

II. Rules Applicable to All Charge Documents

RECOMMENDATION

2. The same pleading rules should apply both to summary conviction and to indictable offences, if the present scheme for classifying crimes within the *Criminal Code* is maintained.

Comments

No reason existed for these differences, which reflected the caprice of historical accident rather than the signature of rational planning. The interests of efficiency and simplicity require uniformity, absent cause for distinctions, and this recommendation advocating uniform rules follows that principle. This has been the law since December 4, 1985, according to section 731 in Part XXIV of the *Criminal Code*. In the trial of summary conviction matters, this provision adopts the relevant sections applicable to indictable offences found in Part XVII of the *Criminal Code*.

It should be noted that the need for uniform rules does not exist under these proposals if our recommendation for a single charge document is accepted. Also, under the classification scheme proposed in our Working Paper 54, *Classification of Offences*,[40] the summary/indictable distinction disappears (with the reclassification of all federal offences as crimes or infractions, crimes alone falling within the scope of criminal procedure and being punishable by imprisonment); therefore, a single set of pleading rules applicable to a single charge document obtains.

III. The Form of the Charge Document

RECOMMENDATION

3. (1) The contents of a charge document should be required to be in the following form: style of cause, "Statement of Alleged Crime" and "Details of Alleged Crime," separated into distinct paragraphs.

(2) Ancillary provisions should include the following:

(a) allegations in one count may be incorporated by reference in another;

40. *Ibid.*

(b) a count should contain no prejudicial matter (such as an alias) unless necessary to comply with the requirements of law;

(c) a count should contain no surplusage, save that which is relevant, non-prejudicial and necessary in the interest of ensuring a fair trial;

(d) a court may amend a count so as to delete prejudicial averments; a court may also grant necessary ancillary relief such as an adjournment;

(e) where irreparable prejudice has resulted from the inclusion in a count of prejudicial averments, the court should declare a mistrial or quash the count.

(3) Sections 511, 513, 514, 515 and 517 of the *Criminal Code* should be repealed as a consequence of these recommendations.

Comments

The structure of the charge document is not substantially legislated at present. Sections 509 (jury trials) and 496 (trials by judge alone) require an indictment to be on paper or in writing, respectively, and permit it to be in Form 4 of the *Criminal Code* while section 723 requires a summary conviction information to be in Form 2 (see Appendix B, II. Current Forms for Charge Documents). Section 455.2 also permits an information for an indictable offence to be in Form 2. These documents are vague as to the actual framing of the counts within them. The express contents of a charge should be the subject of a *Criminal Code* section. One possible approach is that followed in other Commonwealth jurisdictions.

The English practice is to provide a ''statement of offence'' together with ''particulars of offences'' in separate paragraphs.[41] The Hong Kong *Indictment Rules* create a similar general form of charge: style of cause, ''statement of offence'' and ''particulars of offence,'' each in a separate paragraph.[42] This seems an appropriate form to adopt which balances opposing interests. It requires sufficient specificity to be fair to the accused and to provide for an efficient process. It does not require so much that it become overly onerous to the prosecutorial authorities. However, we would indicate that in this context we prefer the phrase ''details of alleged crime'' to ''particulars of offence.'' The term ''particulars'' in our view should be reserved for the more limited circumstances outlined in Recommendation 9, *infra*.

An example of the charge document as proposed is as follows:

41. *Supra*, note 26.

42. Hong Kong *Indictment Rules*, c. 221, s. 9.

Canada,
Province of Ontario,
Judicial District of York

In the District Court

Her Majesty the Queen
against
John Doe

Statement of Alleged Crime

Robbery, contrary to paragraph 302(*d*) of the *Criminal Code*.

Details of Alleged Crime

John Doe, on the 5th day of March, 1986, at approximately 3 p.m., stole the sum of approximately $10,000, while armed with a shotgun, from the Canadian Bank, Dufferin and Simcoe Streets, Toronto, Ontario.

The informant, Charles Davis, of the Municipality of Metropolitan Toronto, a police officer with the Metropolitan Toronto Police Force, has reasonable grounds to believe and does believe that John Doe, d.o.b. September 5, 1964, has committed the alleged crime in the manner set out above.

Sworn before me, Mr. Jeffrey Jones,
this 4th day of June
A.D. 1986, at Toronto

A Justice of the Peace in
and for the Judicial
District of York

.....
Signature of Informant

Certain other particular matters should be expressly dealt with: for example, that allegations made in one count may be incorporated by reference in another count, and that a count should contain no prejudicial matter, such as an alias, unless necessary to comply with the requirements of law. (An alias is prejudicial since its existence may lead the trier of fact to conclude that the accused has a prior criminal record or is of unsavoury character, in view of his alleged efforts made to shield his identity. This may divert the jury's attention from the main issue in the case, namely, determining whether the evidence supports the charge.)

A count should contain no surplusage (matters not essential to be proved) unless relevant, non-prejudicial and necessary in the interest of ensuring a fair trial. The "surplusage rule" is intended to overcome the excessive technicalities of former procedural requirements which governed the law of pleadings. Its ultimate purpose is to require the accused to meet the intrinsic merits of the accusation.

It should be remembered that a criminal charge is a public document, one that attracts a great deal of interest for reasons which are obvious. An accused person has a legitimate interest — one not ordinarily outweighed by countervailing considerations —

in keeping prejudicial surplusage out of the charge. Therefore, the surplusage rule is subject to the qualification that the accused should not, through the operation of the rule, suffer irreparable prejudice in his defence. Such occasions will be exceedingly rare since there are few circumstances which will be unamenable to rectification through the granting of an adjournment, the recalling of witnesses, appropriate orders as to costs or other like remedies. Where irreparable prejudice does arise, however, the only alternatives available to a court will be the quashing of the charge or the declaration of a mistrial.

Sections of the *Criminal Code* setting out special procedural rules for specific offences should be repealed. If the charge document does not comply with the basic requirements set out in our proposals, specific sections should not be allowed to save it. Thus section 511 (high treason and murder) as well as sections 513 (libel), 514 (perjury) and 515 (fraud), should be repealed. Section 517, dealing with the ownership of property, is a reference to common law technicalities about ownership. It is now unnecessary and should be deleted.

IV. The Contents of the Charge Document

RECOMMENDATION

4. The initial requirements for the contents of a charge document should be legislated to constitute the following:

(a) a charge document must be in writing in Form A (see Appendix B, I);

(b) the present policy of allowing charge documents to cover multiple offences (and accused for that matter) is non-contentious and sound;

(c) each crime charged should be set out in a separate count;

(d) each count should apply to a single transaction; and

(e) each count should contain the following elements:

(i) an allegation of the commission of an identified crime,

(ii) a reference to the statutory authority creating the specific crime,

(iii) a reference to the essential legal elements constituting the crime, and

(iv) sufficient detail of the factual circumstances of the alleged crime to fulfil two purposes: to identify the transaction referred to, and to give the accused reasonable information of the act or omission to be proved against him.

Comments

The *Criminal Code* has a number of provisions governing the contents of informations and indictments. The concept that the charge against an accused must meet certain standards is fundamental, both in the interests of fairness and in the interests of permitting an efficient adversary system to operate. There are two aspects to this requirement: first, it gives initial notice to the accused; and second, it restricts corrections allowable at the trial stage. Paragraph 11(*a*) of the *Charter*, which provides an accused with the right to be informed of the specific offence without unreasonable delay, appears to elevate this requirement to a constitutional level.

The initial requirements for the contents of a charge document meet the general statement of principle enunciated by the Supreme Court of Canada in *Côté*, and essentially represent our present law with some exceptions. As was stated there:

> [T]he golden rule is for the accused to be reasonably informed of the transaction alleged against him, thus giving him the possibility of a full defence and a fair trial. When, as in the present case, the information recites all the facts and relates them to a definite offence identified by the relevant section of the *Code*, it is impossible for the accused to be misled. To hold otherwise would be to revert to the extreme technicality of the old procedure.[43]

Our consultations yielded two sentiments, consistently expressed: essential averments should always be set out, since there seems no good reason other than carelessness not to do so; and some degree of factual specificity in the allegations is essential in the interests of fairness.

Consultants agreed that the charge should contain a reference to the statutory provision creating the offence. Other jurisdictions recognize the desirability of statutory references in charges. For example, under the Hong Kong *Indictment Rules*,[44] a reference to the statutory instrument creating the offence is mandatory; the particulars must disclose the essential elements of the offence (though violation of this rule is inconsequential if the defence is not embarrassed or prejudiced by such omission). In the United States, the *Federal Rules of Criminal Procedure* provide:

> ... The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated.[45]

In actual practice in some Canadian jurisdictions there is always a reference to a section of the *Criminal Code*. Requiring a reference to a specific provision allegedly violated (that is, the section number) eliminates any uncertainty or ambiguity on a vital matter and helps simplify the charge document. It will also assist the Crown when the pleadings are attacked.

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43. *Supra*, note 8 at 13.

44. *Supra*, note 42.

45. *Federal Rules of Criminal Procedure for the United States District Courts* as amended to June 1, 1985, Rule 7(c)(1) [hereinafter *Federal Rules of Criminal Procedure*].

It is important to bear in mind that what is being discussed here in relation to the contents of the charge document is the initial notice requirements. The extent to which corrections are to be allowed, or the question of when an error must be raised if it is to be "cured," are separate issues to be addressed below: raising objections to the validity of charge documents is discussed in Recommendation 6, and making amendments is dealt with in Recommendation 7.

A Note on the Single Transaction Requirement

The *Criminal Code* requires that each count in an information or indictment must be set out in a separate paragraph and shall, in general, refer to a single transaction (see subsection 510(1)). The *Criminal Code* does not define what is meant by the term "single transaction." Nor does it explain the purpose behind the rule. The case-law is similarly deficient in shedding light on this subject. Rather, "[t]he word has been interpreted as the justice of each case demanded rather than by any abstract definition."[46]

There is agreement to the effect that the phrase is not synonymous with "offence" and that it means more than merely an incident or occurrence. Thus it is possible to draft a valid count, which complies with the single transaction requirement, that entails factual allegations pertaining to multiple incidents or to incidents or occurrences involving multiple persons (whether as accused or victims). Also, a valid count may describe one continuing offence. As a result, under the present rules of pleadings the single transaction requirement is satisfied where a single count alleges that several men have raped one woman. Also, subject to the qualifications described below, the rule is satisfied where the count alleges that several attacks were perpetrated by one offender against the same victim. And, to take one final example, where several people are killed in one automobile accident the single transaction rule may be complied with by one charge that alleges that a driver caused the death of the several victims by criminal negligence.

In all of the examples given above it is also potentially open to the Crown to subdivide the incident into separate offences, or transactions, and lay multiple charges (provided that other procedural rules prohibiting duplicity or double jeopardy are not infringed by drafting the charges in that manner).

The rule seems to be circumscribed by the necessity to have a close relationship as to time and place with respect to the component incidents. Thus, while it is possible to allege, in a single count, a fraud involving numerous victims who have been defrauded in one interconnected and general scheme, a charge which alleges acts of

46. *R.* v. *Canavan and Busby* (1970), 12 C.R.N.S. 385 at 388 (Ont. C.A.), Schroeder J.A.

fraud over a long period of time, in different places, involving different victims and different representations would be invalid.[47]

Perhaps the best demonstration of the importance and necessity of the single transaction rule is to be found in the conspiracy charge. Conspiracy, by its very nature, involves a complex and closely interwoven set of circumstances that give rise to a single allegation. Typically, a conspiracy is comprised of a series of discrete events, some of which may be chargeable as criminal offences. However, it is the totality of these circumstances and events that gives rise to something chargeable that is of even greater significance, namely, the conspiracy to carry out the ultimate unlawful purpose.

The major justification for the rule revolves around the desirability of providing a wide discretion to the Crown in the charging process. The ability to charge a single transaction where multiple incidents are involved has undoubted implications and uses in the plea bargaining process. From the Crown's perspective it is usually an advantage to treat several acts as one transaction. As Atrens points out "it enlarges the scope of admissible, relevant evidence, and increases the chances of conviction, because proof of any act falling within the count will suffice."[48] Others have indicated that the rule is "open to the criticism that confusion and prejudice to the accused results from evidence being advanced upon a multiplicity of offences covered by one count."[49] However, the accused does have the benefit that, if prosecuted for the events that fall within the scope of an all-encompassing count, he or she may successfully plead *autrefois convict* or *autrefois acquit* as a bar to any subsequent prosecution on any of the component incidents which are capable of founding a sufficient charge in themselves.

Pigeon J., in the case of *R.* v. *Cotroni*; *Papalia* v. *R.*,[50] asserted that the single transaction rule should be read subject to the requirement in subsection 519(3) of the *Criminal Code* to the effect that the court, where it is satisfied that the interests of justice require it, may order that a count be amended or divided into two or more counts. This is not the prevailing view, although there is support for it in case-law subsequent to *Cotroni and Papalia*.[51] We are convinced that this interpretation, entailing as it does elements of both fairness and flexibility, accords with sound policy and we therefore recommend that the single transaction rule be subject to this kind of judicial discretion. This is the import of Recommendation 14, *infra*, which indicates that a court should be empowered to grant severance of accused or counts that are jointly charged in the interests of justice.

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47. See and contrast: *R.* v. *Kisinger and Voszler* (1972), 6 C.C.C. (2d) 212 (Alta. C.A.) — fraud involving one general scheme; *R.* v. *Rafael* (1972), 7 C.C.C. (2d) 325 (Ont. C.A.) — fraud involving separate transactions. These examples and the accompanying text of much of this section derive from J.J. Atrens in J.J. Atrens, P.T. Burns and J.P. Taylor, eds, *Criminal Procedure: Canadian Law and Practice*, vol. 2 (Vancouver: Butterworths, 1981) c. X: "The Wording of Counts" at 84.

48. Atrens *et al.*, *ibid.* at 85.

49. R.E. Salhany, "Duplicity — Is the Rule Still Necessary?" (1963-64) 6 Crim. L.Q. 205 at 225.

50. *R.* v. *Cotroni*; *Papalia* v. *R.* (1979), [1979] 2 S.C.R. 256 at 269, [hereinafter *Cotroni and Papalia* cited to S.C.R.].

51. See the cases cited by Atrens *et al.*, *supra*, note 47 at 89 in footnote 343.

V. Attempts and Included Crimes

RECOMMENDATION

5. Within the structure of the *Criminal Code* as presently constituted, section 587 governing liability for attempts should be retained without change. However, section 588 should be modified to provide that an accused charged with attempt should be convicted of attempt if the evidence establishes the commission of the complete crime, rather than being charged with the complete crime and bearing the expense of a new trial. Ultimately, sections 587 and 588 should be modified along the lines recommended in our Report 30, *Recodifying Criminal Law*, volume 1.[52] In addition, section 589, governing liability for included crimes, should be changed to limit the doctrine of included crimes to those crimes included as a matter of law, and to exclude crimes which may otherwise have been included as a matter of drafting.

Comments

Sections 587, 588 and 589 provide for the enlargement of the field of liability which an accused must confront beyond the specific parameters of the charge document itself. An accused person is liable not only for the crime charged, but also, depending upon circumstances and proof, for the attempted commission of that crime or for any offence that is ''included'' in the offence charged. The relevant *Criminal Code* provisions read as follows:

> **587.** **[Full offence charged, attempt proved]** Where the complete commission of an offence charged is not proved but the evidence establishes an attempt to commit the offence, the accused may be convicted of the attempt.
>
> **588.** (1) **[Attempt charged, full offence proved]** Where an attempt to commit an offence is charged but the evidence establishes the commission of the complete offence, the accused is not entitled to be acquitted, but the jury may convict him of the attempt unless the judge presiding at the trial, in his discretion, discharges the jury from giving a verdict and directs that the accused be indicted for the complete offence.
>
> (2) **[Conviction a bar]** An accused who is convicted under this section is not liable to be tried again for the offence that he was charged with attempting to commit.
>
> **589.** (1) **[Offence charged, part only proved]** A count in an indictment is divisible and where the commission of the offence charged, as described in the enactment creating it or as charged in the count, includes the commission of another offence, whether punishable by indictment or on summary conviction, the accused may be convicted
>
> (*a*) of an offence so included that is proved, notwithstanding that the whole offence that is charged is not proved, or

52. LRCC, *Recodifying Criminal Law*, vol. 1 (Report 30) (Ottawa: LRCC, 1986).

(*b*) of an attempt to commit an offence so included.

(2) **[First degree murder charged]** For greater certainty and without limiting the generality of subsection (1), where a count charges first degree murder and the evidence does not prove first degree murder but proves second degree murder or an attempt to commit second degree murder, the jury may find the accused not guilty of first degree murder but guilty of second degree murder or an attempt to commit second degree murder, as the case may be.

(3) **[Conviction for infanticide or manslaughter on charge of murder]** Subject to subsection (4), where a count charges murder and the evidence proves manslaughter or infanticide but does not prove murder, the jury may find the accused not guilty of murder but guilty of manslaughter or infanticide, but shall not on that count find the accused guilty of any other offence.

(4) **[Conviction for concealing body of child where murder or infanticide charged]** Where a count charges the murder of a child or infanticide and the evidence proves the commission of an offence under section 227 but does not prove murder or infanticide, the jury may find the accused not guilty of murder or infanticide, as the case may be, but guilty of an offence under section 227.

(5) **[Conviction for dangerous driving where manslaughter charged]** For greater certainty, where a count charges an offence under section 203, 204 or 219 arising out of the operation of a motor vehicle or the navigation or operation of a vessel or aircraft, and the evidence does not prove such offence but does prove an offence under section 233, the accused may be convicted of an offence under section 233.

(6) **[Conviction for break and enter with intent]** Where a count charges an offence under paragraph 306(1)(*b*) and the evidence does not prove such offence but does prove an offence under paragraph 306(1)(*a*), the accused may be convicted of an offence under paragraph 306(1)(*a*).

There are strong proponents of the view that liability for criminal conviction should be limited strictly to the statutory provision involved in the charge laid against an accused, and that any further jeopardy that an accused might face should not arise by implication. This is a manifestation of the fairness principle. Criminal liability should not exist by implication, and the limits of liability should be expressly set out in a charge document. To reiterate, this notice function is one of the reasons for the existence of the charge document in criminal procedure.

However, insistence on the express statement of the full field of liability would reduce efficiency. For example, every criminal charge is presently felt by necessity to include an implicit allegation of an attempt to commit the crime, and if the Crown fails to prove an element of the *actus reus* of the offence charged, it is presently possible to convict the accused of the attempted offence, even though the charge document contains no express reference to such an offence. This occurs by virtue of the operation of *Criminal Code* sections 587 and 588. More effort would obviously be required in drafting if an attempt had to be set out as a separate count in every charge document. Yet that would be necessary if sections 587 and 588 did not exist. It is in this sense that these sections add efficiency to the system. Moreover, this is achieved without perceived unfairness since liability for attempt is a given in every charge.

In Report 30, we recommended substantive changes to the law of attempts and introduced the concepts of furthering and attempted furthering.[53] We did not, however, recommend altering the general orientation of the law with regard to this kind of implied liability for included offences. Thus, section 33 of our revised Code contains *inter alia* the following provisions:

> **33.** (1) Every one charged with committing a crime may on appropriate evidence be convicted of committing it, furthering it, attempting to commit it or attempted furthering of it.
>
> (2) Everyone charged with furthering the commission of a crime may on appropriate evidence be convicted of committing it, furthering it, attempting to commit it or attempted furthering of it.
>
> (3) Every one charged with attempting to commit a crime may on appropriate evidence be convicted of attempting to commit it or attempted furthering of it, regardless of whether the evidence shows that he committed the crime or furthered the crime.
>
> (4) Every one charged with attempted furthering of a crime may on appropriate evidence be convicted of attempting to commit it or attempted furthering of it, regardless of whether the evidence shows that he committed the crime or furthered the crime.[54]

More contentious than implicit potential liability for the attempted commission of the offence charged, however, is the wider doctrine of included offences. This doctrine covers two different categories or situations.

Certain offences are *statutorily included* (or included as a matter of law) in others; that is, by an express provision such as is found in subsection 589(5) of the *Criminal Code*, which provides that where a count charges a crime under section 203 (causing death by criminal negligence), 204 (causing bodily harm by criminal negligence) or 219 (manslaughter) arising out of the operation of a motor vehicle and the evidence does not prove such crime, but does prove a crime under section 233 (criminal negligence in the operation of a motor vehicle), the accused may be convicted of a crime under section 233. To the extent that the combinations are arbitrary, questions of fairness arise.

In the next category of included offences, questions of fairness are more cogent. In this category, offences become included not by statutory provision, but *as a matter of drafting* by the prosecutor's choice of wording in the particular count. An offence can be included in another offence charged if the count by its wording includes all the necessary elements of the lesser offence. Since *Criminal Code* section 222 provides that attempted murder may be committed "by any means," appropriate particularization may create an alternative verdict not available merely from the statutory provisions. Thus, a charge of attempted murder "by beating [H.] with a .410-gauge shotgun" has

53. *Ibid.* at 42-6.

54. *Ibid.* at 104-5.

been held to include the crime of assault causing bodily harm.[55] The issue is whether this additional liability for included offences is inconsistent with the degree of notice and fairness to which an accused is entitled in the wording of a charge document. It should be remembered that the prosecution always has the option of laying alternative counts where there is the evidentiary basis for the proof of those charges.

Our proposal would eliminate implicit liability for included offences. Section 587 in the interim would be retained: it expressly makes liability for attempts an included offence any time a completed crime is charged. In the ultimate redrafting of the *Criminal Code* along the lines suggested in our Report 30, this general policy would remain intact, although sections 587 and 588 would be modified so as to encompass the notions of "furthering" and "attempted furthering."[56] Our approach, which stresses fairness, is consistent with the maxim that everyone is presumed to know the law. While generally, implicit liability is regarded as unfair, where that liability is expressly legislated by Parliament and is not merely the sometimes obscure or hidden result of artful drafting, the unfairness disappears.

VI. Objection to Validity of the Charge Document

RECOMMENDATION

6. Objection to a charge document's validity or sufficiency should be taken by motion to quash the charge prior to plea. If an objection is made thereafter without reasonable explanation for the delay, the failure to object prior to plea without reasonable explanation shall be considered by the court when deciding whether to amend the charge under Recommendation 7, or whether to grant additional relief consequential upon any amendment, such as an adjournment.

Comments

When a charge fails to meet the requirements of proper content, the issue which then arises is the extent to which corrections are to be allowed, and when. Amendment is the general mechanism for correcting charge documents that are deficient when measured against the requirements outlined previously in Recommendations 3 to 5.

The present rule as to timing under section 529 of the *Criminal Code* is that objection to a charge for a defect apparent on the face of the count must be taken before plea. Objection may be taken thereafter only with leave or permission of the

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55. *R.* v. *Durst* (1980), 4 W.C.B. 390 (N.S.C.A.); other examples are found in Ewaschuk, *supra*, note 3 at 431-35.

56. *Supra*, note 52 at 42-6.

court. Thus, the essential difference between pre-plea and post-plea attacks on the validity of a count is the requirement of leave. If leave is refused, generally that terminates the proposed objection; if leave is granted, the objection proceeds and is decided on its merits just as if it had been raised pre-plea. The only qualification is that, with regard to the factors relevant to amendment under present subsection 529(4) of the *Code*, failure to raise the matter before plea may be taken as an indication of an absence of possible prejudice to the accused or of injustice.

Thus, at present pre-plea objections are encouraged by the threat that leave will be refused at a later stage. The refusal of leave means that the alleged deficiency in the charge will not be considered. At common law, this meant that absent post-trial review, the matter was at an end. In the modern era, where the matter can be taken on appeal, and the appeal court may consider the validity of the count, the trial court's failure to consider the alleged deficiency may prevent the appeal court from taking remedial steps that might save the trial from reversal. In other words, from the point of view of the administration of justice, as a practical matter a trial court should consider every alleged deficiency in a charge whenever raised and take any necessary steps to remedy the situation and avoid reversal.

Under Recommendation 7, which follows, quashing a charge will become a rare result. In such a world the requirement of post-plea leave becomes not only logically problematic, but even counter-productive; thus, we have recommended that the requirement of leave to raise post-plea objections to charges be dropped. The challenge that then arises is to ensure that, in the absence of detriment or penalty, there continues to be an incentive for counsel to raise deficiencies prior to plea. Absent visiting the accused with costs, an issue beyond the scope of this Working Paper which is to be addressed in a separate Working Paper on costs in criminal proceedings, the proposal containing the threat of non-amendment represents the best attempt to provide for a legislated detriment to an accused who unreasonably fails to raise an objection to the charge document before plea. A more general treatment of the issues raised with respect to remedies is to be addressed in a separate Working Paper on remedies in criminal procedure.

VII. Amendments

RECOMMENDATION

7. (1) Provisions concerning the validity and sufficiency and amendment of charge documents should provide the following:

(a) amendments should be possible at any time before verdict;

(b) subject to paragraphs (c), (d) and (e) in all cases, a court should be empowered to amend any omission or variance in either the "Statement of

Alleged Crime" or "Details of Alleged Crime," whether of substance or form, to comply with the requirements of a valid charge, unless such amendment, with or without other ancillary relief such as the recalling of any witnesses or the granting of an adjournment, would be prejudicial to a fair trial;

(c) a charge document that is unsigned or unsworn may be amended so as to permit its being signed or sworn, as the case may be, unless a time limitation period has expired;

(d) a court should have no power to amend a document that charges no crime known to law; there is said to be no crime known to law when:

(i) there is no statutory provision at all creating the crime,

(ii) there is a statutory provision creating a crime, but it does not encompass the crime charged,

(iii) there is a statutory provision creating the crime charged, but it was not in force at the time the act or omission occurred, or

(iv) the statutory provision creating the alleged crime is unconstitutional (*ultra vires*, invalid or inoperative under the *Charter*);

(e) a court should have no power to amend and thereby charge a different crime;

(f) the factors to be considered by a court in deciding whether or not to make an amendment should be specified, and would include:

(i) the evidence taken at the trial or preliminary hearing, if any,

(ii) all the circumstances of the case and the proceedings,

(iii) whether the accused has been misled or prejudiced in answering the charge, and whether an adjournment or the recalling for further evidence of any witness would cure the prejudice, and

(iv) whether the objection to the charge is being taken before plea or not.

(2) Lack of factual specificity so as to identify the transaction to be proved should give rise to a right in an accused to have an adjournment upon the amendment of such a defect.

Comments

The issue addressed in subsection 7(1) of these proposals concerns the nature of the response when defects are raised. This presents questions as to when a court *can* correct or amend a defective charge and when it *should* do so.

The proposals call into question the mistaken position based on earlier common law that all variances and omissions are fatal to the prosecution. The contrasting proposition is that no deficiencies of any sort are fatal, although delays to the prosecution may be ordered, by granting adjournments to provide the defence with an

opportunity to prepare adequately to meet the amended charge. These proposals give considerable recognition to the interests of efficiency through permitting almost all possible amendments, but they do so without detracting from the legitimate interests of the defence. If adopted, they should end the criticism of this area of procedure once and for all, haunted as it is by common law ghosts.

Paragraphs 7(1)(a), (b) and (c) deal with when a court *can* amend; paragraphs 7(1)(d) and 7(1)(e) address specific, limited instances when no power to amend a pleading is permitted; and paragraph 7(1)(f) sets out the factors to be considered when a court is asked to amend a defective charge document or count.

Thus, paragraph 7(1)(a) seeks to achieve, in unambiguous and express language, the desired effect of previous unsuccessful *Criminal Code* amendments.

Paragraph 7(1)(b) establishes a broad power of amendment irrespective of whether the matter to be amended is purely formal or is a matter of substance, but balances the power with a correlative power to grant ancillary relief in the form of adjournments or the recalling of witnesses in order to safeguard the fairness of the trial.

Paragraph 7(1)(c) addresses the rare instance where an unsigned or unsworn charge reaches the court. We are satisfied that in virtually all such cases this situation arises through technical oversight or careless omission. The entire prosecution should not founder or fail because of such errors, even if occasioned through negligence, since the public interest in securing a trial on the merits is clearly paramount. Therefore we recommend a power of amendment subject to the same rights to ancillary relief discussed in paragraph 7(1)(b). The major exception to the rule which we propose involves the expiry of a time limitation period. No amendment may be made under our scheme where a time-limit has elapsed. The only applicable time-limit is that found presently in the *Criminal Code* pertaining to summary conviction offences (no proceedings to be instituted more than six months after the subject-matter of the proceedings arose: subsection 721(2)). In our Working Paper 54 on *Classification of Offences*[57] we propose that crimes punishable by two years or less imprisonment be subject to a one-year limitation period (that is, one year after the time when the subject-matter of the proceedings has arisen and the identity of the offender has been ascertained).

Paragraph 7(1)(d) addresses the situation of a charge document which alleges the commission of misconduct which legally constitutes "no offence known to law." This covers cases such as *Gralewicz et al.* v. *R.*[58] and *R.* v. *Dungey*[59] where an "unknown offence" was charged. The former case held that there can be no such charge as conspiracy to commit a breach of section 110 of the *Canada Labour Code*,[60] because that section did not create any prohibition or requirement, the breach of which could

57. *Supra*, note 1 at 44-5.

58. (1980), [1980] 2 S.C.R. 493, 54 C.C.C. (2d) 289.

59. (1979), 51 C.C.C. (2d) 86 (Ont. C.A.) [hereinafter *Dungey*].

60. R.S.C. 1970, c. L-1.

constitute the object of a conspiracy. *Dungey* held that there is no such offence known to law as attempted conspiracy to commit an offence. These are the rare cases that involve charges absolutely lacking in legal force or effect, which our proposals would continue to treat in the same manner as the present law.

However, these proposals would make clear that peculiar cases such as *Vallée*,[61] involving the deficient or non-existent statement of essential averments, are cases where the defect is amendable under the wide scope of amendment in paragraph 7(1)(b). In other words, we wish the presently unqualified words "no offence known to law" to mean "no offence known to law other than through a lack of an essential averment or other similar defect." More precisely, in our view there is no offence known to law only when: no statutory provision creates or encompasses the offence charged; the relevant provision was not in force at the time of the alleged offence; or the provision is unconstitutional.

Paragraph 7(1)(e) reiterates the present rule that a court should have no power to amend and thereby charge a different crime.[62]

Paragraph 7(1)(f) sets out the factors to be considered by a court in deciding whether or not to make an amendment to a deficient charge document or count.

Subsection 7(2) creates an accused's presumptive right to an adjournment where the court has amended a pleading which lacks sufficient factual specificity in identifying the alleged transaction. The leading case, *R.* v. *WIS Development Corp. Ltd.*,[63] was applied in *R.* v. *Bingo Enterprises Ltd.*,[64] where an information alleging the accused "did unlawfully keep a common gaming house" over a nine-month period at a specific address was held to be a nullity. The information failed to specify any of a number of separate and distinct activities which could constitute the offence. Philp J.A. held for the court:

> In my view, the circumstances in *Wis Development* and in this appeal are analogous. In both cases the charges in the informations are in the words of the enactments that describe the offences. The *Aeronautics Act* defines the operation of a "commercial air service" to include a multitude of activities or usages of aircraft and the *Criminal Code* defines a "common gaming house" to include a number of separate and distinct activities. In neither case do the charges describe the offences in such a way as to lift them from the general to the particular.
>
> The charge against the accused in this appeal is bad in law, not merely defective, and, as noted by Lamer J. in *Wis Development* [at p. 138], "particulars have never been considered as a proper means to cure vitiated informations for defects of substance."[65]

Allowing amendments of such defects while providing a right to an adjournment for the defence seems a more reasonable response.

61. *Supra*, note 31.

62. See *R.* v. *Elliot* (1969), [1970] 3 C.C.C. 233 (Ont. C.A.).

63. (1984), [1984] 1 S.C.R. 485, [1984] 12 C.C.C. (3d) 129.

64. (1985), 15 C.C.C. (3d) 261 (Man. C.A.).

65. *Ibid.* at 264.

RECOMMENDATION

8. Provision should be made to allow the following responses by an appeal court to grounds of appeal involving alleged error by the trial court with regard to the validity or sufficiency of counts or charge documents:

(a) inconsequential amendments could be made by the appeal court to clear up the record without the necessity of allowing the appeal;

(b) the appeal court could similarly amend the record without the necessity of allowing the appeal where the defect is more serious but relates to a factual issue that was tried and determined at trial in all respects as if the defect in the charge had not been present or the proper amendment had been made; and

(c) in all other situations where the charge document could have been amended by the trial court, the appeal court would be empowered to amend a count or charge document if to do so would be in the interests of justice; alternatively, the appeal court should be empowered to quash the conviction without necessarily ordering a new trial or entering an acquittal.

Comments

These proposals would not be complete without consideration of the issue of deficiencies and amendments on appeal. If it is contended that a trial court erred or was wrong in any of its decisions under the above proposals, the matter may be raised on appeal. The only troublesome case requiring special consideration is where the trial court has *failed* to do something, such as amend a charge. What is to be the proper response on appeal if the appeal court agrees that the objection was well founded and the trial court erred by not doing anything? It should be noted that, in principle, this question covers the situation where the trial court fails to act because the objection was not raised by either party.

In our view, a fair and complete scheme of criminal pleading should recognize the following three categories of responses on appeal: first, inconsequential amendments could be made to clear up the record; second, the record could be amended to make the pleadings correspond with the facts as determined at trial; and third, amendments could generally be made or convictions quashed in the interests of justice. In the latter case, although the proceedings would be set aside, the court could still consider whether or not another trial should be held.

The test for amendment by an appeal court is far stricter than that governing the trial forum. This is because various forms of ancillary relief to the defence, such as granting an adjournment or ordering particulars, are not available in the appellate forum.

IX. Particulars

RECOMMENDATION

9. (1) The trial judge may order particulars further describing any matter relevant to the charge.

(2) The legal effect of a particular is the same as if it had been included in the charge as originally drafted. If the matter particularized is not essential to constitute the crime, it is to be treated as surplusage and need not be proved in order to secure a conviction.

Comments

Section 516 of the *Criminal Code* recognizes the power of the court, in the interests of ensuring a fair trial, to order particulars to supplement the factual details set out in the original charge. In this Working Paper, we are restricting the technical meaning of the term "particulars" to those instances where court-ordered additional detail is to be supplied. Particulars give an accused reasonable information to prepare his defence; also, they facilitate the administration of justice by defining the issues, thus assisting the trial judge in ruling on the admissibility of evidence.[66] The legal effect of a particular is the same as if it had been included in the charge as originally drafted. If an essential element or averment of the offence, the particular must be proved or the prosecution will fail. If not essential to constitute the offence, the particular may be treated as surplusage and need not be proved.[67]

The power to order particulars should continue, but should be stated in general terms so that particulars may be ordered to describe any matter relevant to the charge. The ordering of particulars should include not only relevant facts, but also the statutory provisions on which the Crown bases its case.

One effect of the Crown's failure to prove particulars is that a motion may be made to amend the charge to conform with the evidence adduced. This is a result comprehended by our recommendations concerning the power of amendment, particularly Recommendations 7(1)(a) and 7(1)(f)(i). However, the amended charge document is precluded under our proposals from alleging a new or different crime. An example of a proper amendment under our scheme might occur where an accused is charged with theft in the amount of $1,000, but the Crown proves only theft of $500. Here the charge may be amended to conform with the evidence. Similarly, where the Crown particularizes a narcotic as "*cannabis* marihuana" on a charge of unlawful possession for the purpose of trafficking, and proves "*cannabis* resin" (a different

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66. See *R.* v. *Canadian General Electric Co. Ltd. (No. 1)* (1974), 17 C.C.C. (2d) 433 (Ont. H.C.).

67. See *Vézina* v. *R.*; *Côté* v. *R.*; *R.* v. *Vézina and Côté* (1986), [1986] 1 S.C.R. 2, 49 C.R. (3d) 351 [hereinafter *Vézina* cited to S.C.R.].

narcotic contained in the same schedule of the *Narcotic Control Act*),[68] an amendment should be allowed to correct the variance. This was the same result as was reached in the recent Supreme Court of Canada decision in *Morozuk*.[69]

In some cases a court may order particulars to be furnished even though, strictly speaking, the particulars to be provided do not constitute an essential element of the crime to be proved. Such particulars might nevertheless be thought necessary in the interest of ensuring a fair trial. (The particulars would give the accused better information concerning the charge and would thus assist in the preparation of the defence.) An example of where such an order might be made is the case of a charge which alleges a conspiracy to defraud. In such a case, the identity of the victim has been held, as in the recent case of *Vézina*,[70] to amount to mere surplusage. As surplusage, such particulars need not be proved, although in an appropriate case, the particularization of the victim's identity might still be important to the preparation of the accused's defence, and subsequently to the fairness of the trial itself. In our view a court may order the disclosure of details and information relevant to the charge in the exercise of its power to order particulars but, if surplusage, such particulars need only be disclosed or furnished to the defence and need not be included in an amended charge document, unless the court so orders.

X. Appearance of Joint Accused on a Charge Document

RECOMMENDATION

10. Joint accused should appear on a charge document in alphabetical order. In addition, the defence should have the right to reorder cross-examination and defences on agreement among themselves without consent of the Crown or the court.

Comments

Joinder of charges and accused seems a reasonable concession to efficiency in certain circumstances. Nevertheless, the present law and practice have many unsatisfactory aspects.

The order of accused on a joint charge is a practical problem of some importance in at least some jurisdictions in which the prosecutor is viewed as having a complete discretion as to the order of accused. A concern has been expressed that the order of

68. R.S.C. 1970, c. N-1.

69. *Supra*, note 35.

70. *Supra*, note 67.

accused can be manipulated to secure a tactical advantage at trial. In British Columbia, it would appear that the accused are listed in alphabetical order in an attempt to achieve fairness.[71] The common law on this issue is unclear. There is scant authority, but one older case holds that the accused should be called upon for their defence in the order in which their names appear in the information or indictment.[72] However, where the seriousness of the offences varies, the accused may be called upon in order of seriousness of offences.[73] Similarly, it would seem that the trial judge can also reorder the accused with respect to the cross-examination of witnesses and the adducing of evidence, based on the degree of alleged culpability; that is, the principal offender is made to proceed before the alleged party to the offence.

In the only modern authority, this purported judicial discretion was contested. In *R.* v. *Haslam and Wilson*,[74] defence counsel applied for an order that the accused who was second on the indictment be allowed to give evidence first, as he had better knowledge of certain documents. The prosecution raised no objection, provided the court had the power to grant the application. The trial judge held that he had jurisdiction to make the order sought, and on the proper grounds being shown (that the second accused would be better able to explain the defence), the application was granted.

Any doubt concerning this jurisdiction should not continue. It would seem eminently fair that joint accused should appear on a charge document in alphabetical order. As well, without in any way fettering the right of the Crown to present its case as it sees fit, the defence should have the right to reorder cross-examination and defences on agreement among themselves without the necessity of obtaining consent from the Crown or the court. We can see no prejudice to the Crown or the administration of justice from such a right.

XI. Provisions Governing Joinder of Accused and Counts

RECOMMENDATION

11. Express provisions should state when joinder of accused and counts is permissible. The elements of the applicable rules should be some or all of the following:

(a) crimes may be joined as counts in a charge document if

(i) they arise from the same transaction,

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71. Ewaschuk, *supra*, note 3 at 388.

72. *R.* v. *Barber, Fletcher and Dorcy* (1844), 1 Car. & K. 434, 174 E.R. 880.

73. *R.* v. *Barsalou (No. 3)* (1901), 4 C.C.C. 446 (Qué. K.B.).

74. *R.* v. *Haslam & Wilson* (1983), [1983] Crim. L.R. 566.

(ii) they are part of a series of crimes of similar character (evidence of each of which is admissible in proof of the others; this would be consistent with the general relationship between issues of severance and similar fact evidence),

(iii) they are part of a common scheme or plan, or

(iv) they are so closely connected in time, place and occasion that it would be difficult to separate proof of one from proof of the other(s); and

(b) offenders may be jointly charged in a charge document or count thereof if:

(i) they participated in the same transaction on which the charge or charges are based,

(ii) they participated in a common scheme or plan, or

(iii) they are charged with crimes which are so closely connected in time, place and occasion that it would be difficult to separate proof of one from proof of the other(s).

Comments

Another issue on which there is surprisingly little Canadian authority is the Crown's right to join charges. Subsection 520(1) of the *Criminal Code* seems to allow joinder without limitation, except for murder charges, and provides that "any number of counts for any number of offences may be joined in the same indictment, ..." Given the absence of any more specific provision in the *Criminal Code* governing joinder of accused, the statutory law in Canada, if taken to its logical extremity, would seem to permit the joinder in one indictment of all accused for all offences committed, for example, in any given month.

At early common law, indictments also contained multiple counts. However, an indictment could not include both felonies and misdemeanours. It was the practice of the prosecution to charge an accused with all the offences he had allegedly committed in one indictment, and require him to answer to them at the same time. The practice arose of requiring the Crown to proceed on only those charges arising out of the same facts, so that they could be conveniently tried together.[75] Later practice generally prohibited the prosecution from including more than one felony in an indictment.[76]

Until recently an information charging an indictable offence could not jointly charge a summary conviction offence; any conviction was a nullity and would be quashed. The current case-law suggests that it is only the trial of an indictable offence together with a summary conviction offence which is objectionable.[77] This restriction

75. Salhany, *supra*, note 9 at 231-2.

76. Ewaschuk, *supra*, note 3 at 243.

77. Salhany, *supra*, note 9 at 233, citing *R.* v. *Morelli* (1970), 2 C.C.C. (2d) 138 (Ont. C.A.) and *R.* v. *Spratt* (1963), [1963] 3 C.C.C. 342 (Ont. Co. Ct.); but see *R.* v. *Bee* (1975), 28 C.C.C. (2d) 60 (B.C.C.A.).

stems from the different procedures followed in summary conviction and indictable offences. Although numerous counts may be tried together, there is a discretion in the trial judge not to hear numerous charges together where prejudice may result to an accused. Such risk of prejudice to an accused is greater in jury trials.

The recent case of *R.* v. *Goler*,[78] which concerns trial by judge without a jury, appears, on a reading of section 496 of the *Criminal Code*, to permit the combined charging in a single indictment of various offences for which the accused was committed to stand trial after separate preliminary hearings on separate informations. Formerly, a strict rule prohibited trying an accused on more than one indictment or information, even with his consent, and the proceedings were set aside as a nullity.[79]

The current law does provide for improperly joined charges to be severed from one another. However, whatever the rule, the severance of properly joined charges necessarily involves a matter of judgment on the part of the court. If there is to be limitation on the right of the Crown to join charges in the first place, then the separation of those charges must become a matter of right on the part of the accused where joinder is improper. The common law rule applicable in Canada is not clear, though there is authority that, as provided in England by statute, there must be a nexus in time and place between counts for joinder to be proper.[80] This is a loose requirement, limited as it is to a physical and temporal nexus, one which arguably can result in considerable prejudice to an accused. Other jurisdictions have fashioned different approaches to this problem.

The Hong Kong *Indictment Rules*,[81] in section 9, provide that offences may be joined if they are founded on the same facts, or form or are a part of a series of offences of the same or a similar character.

The American *Federal Rules of Criminal Procedure*[82] also contain express provisions governing joinder of accused and offences:

> Rule 8. Joinder of Offenses and of Defendants
>
> *(a) Joinder of offenses.* Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged ... are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.
>
> *(b) Joinder of defendants.* Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses ....

78. (1985), 67 N.S.R. (2d) 200 (C.A.).

79. Salhany, *supra*, note 9 at 233-4.

80. Ewaschuk, *supra*, note 3 at 242.

81. *Supra*, note 42.

82. *Supra*, note 45.

The unwritten nature of our rules governing joinder is obviously unsatisfactory. Our recommendation entails an express provision similar to the American Federal Rule 8. Such a provision would impose more reasonable limits on the joinder of offences and accused than is presently the case.

XII. Joinder of Charge Documents

RECOMMENDATION

12. A court should, in the interests of justice, be empowered to order two or more charge documents to be tried together if the alleged crimes and the accused persons (if there are multiple accused) could have been joined in a single charge document in the first instance, or if the accused or accused persons consent and the court concurs. The procedure would then be the same as if the prosecution were under a single charge document. Joinder should only be granted where the accused has consented to the trial of both matters in a forum without a jury and without a preliminary inquiry. Indictable offence procedural requirements should govern in the event of any conflict as to applicable procedure.

Comments

A related problem is the joint trial of separately charged offences or accused. Under present law this is flatly prohibited.

In the leading case of *Phillips and Phillips* v. *R.*,[83] the Supreme Court of Canada ordered a new trial following the conviction of two accused who had been tried together, with their consent, although they had been charged separately in separate informations. The court held that "a trial judge is without jurisdiction to try together separate informations or indictments under the *Criminal Code*."[84] The court felt that its ruling would not create a problem for the administration of justice, since proper joinder would solve the problem of holding more trials than necessary or desirable. The court held that even at the beginning of a trial where there are separate informations or indictments that should have been charged jointly, it is open to the trial judge in his discretion to permit the amendment of one document to include the charges or accused from the other in a proper case. Although possible, this situation would rarely occur. In any event, there is a certain irony in the court's pronouncement. *Phillips* was based on a 1921 English decision, *Crane* v. *D.P.P.*,[85] where the House of Lords had held that

83. (1983), [1983] 2 S.C.R. 161, 35 C.R. (3d) 193 [hereinafter *Phillips* cited to S.C.R.].

84. *Ibid.* at 171.

85. (1921), [1921] 2 A.C. 299.

a single trial on more than one indictment was a nullity. However, in *Chief Constable of Norfolk* v. *Clayton*,[86] a case decided about the same time as *Phillips*, the House of Lords rejected the absolute nature of this rule, and held that separate charges could be tried together, if this were in the overall interests of justice and fair to the accused.

We have concluded that abolishing the blanket rule proscribing the joinder of separately charged offences or accused is justified. We propose the allowance of judicial joinder where two conditions are met: that joinder is in the interests of justice, and that the offences or accused could initially have been jointly charged. (It also bears noting that any particular aspects of the rule in favour of severance would have to be inapplicable in order for this judicial joinder to occur. This rule would thus reflect the rule for unsuccessful severance on a joint charge.)

The formulation in the American *Federal Rules of Criminal Procedure* is similar to our proposal. It reads as follows:

> The court may order two or more indictments or informations or both to be tried together if the offenses, and the defendants if there is more than one, could have been joined in a single indictment or information. The procedure shall be the same as if the prosecution were under such single indictment or information.[87]

In addition to the foregoing, we would favour joinder of offences or accused in any situation where the accused consents to such a procedure and the court concurs. The result is somewhat different depending on the nature of the classification scheme which is employed. Under the present law classifying offences the following qualification on this rule should obtain: summary conviction offences should be joined with indictable offences only where the accused has waived the right to be tried in a higher court (either with or without a jury) and has also foregone his right to a preliminary hearing. In other words, joinder may occur only where trial on the indictable offence is to take place before the provincial court. In the event of any conflict as to the applicable procedure, indictable offence procedure should apply. Under our revised classification scheme we favour similar qualifications.[88] Juryable crimes may be joined with those carrying no right to a jury trial (or preliminary inquiry), provided the accused has consented to the trial of both matters in a forum without a jury and without a preliminary inquiry.

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86. (1983), 77 Cr. App. R. 24 (H.L.).

87. *Supra*, note 45, Rule 13.

88. These matters are developed in LRCC, *supra*, note 1.

XIII. Joinder of Other Charges with Murder

RECOMMENDATION

13. It is recommended that section 518 of the *Criminal Code*, regarding joinder of another charge with murder, be amended to allow the joinder of the crimes of manslaughter, attempted murder or criminal negligence causing death. Furthermore, in the interests of justice, any juryable crime could be joined with the consent of the accused.

Comments

The *Criminal Code* presently prohibits any crime other than murder from being tried with a charge of murder. In actual fact, this flat prohibition may be unfair to both sides. The offences of manslaughter, attempted murder and criminal negligence causing death are often linked to an allegation of murder, but the present rule forecloses the possibility of joinder. We would relax the rule to permit joinder of this nature. The result of such joinder would be that the accused would be precluded from electing a mode of trial other than trial by judge and jury. However, recent amendments to section 430 of the *Criminal Code*[89] now allow for the waiver of the jury provided that both the accused and the Crown consent. Where such a waiver occurs and the parties agree, the trial then proceeds as a trial by judge alone in the superior court. Furthermore, we see no cause for objection to the joinder of any other charge capable of being tried by a jury with that of murder, where the accused consents and the court is of the opinion that the interests of justice would thus be served.

XIV. Severance of Accused and Counts

RECOMMENDATION

14. A court should be empowered to grant severance of accused or counts that are jointly charged in the interests of justice. The statutory test for severance should be set out. In assessing the interests of justice the court may consider the following grounds:

(a) that the accused have antagonistic defences;

(b) that important evidence in favour of one of the accused, which would be admissible on a separate trial, would not be allowed on a joint trial;

(c) that evidence which is inadmissible against one accused is to be introduced against another, and that this would prejudice the jury toward the former;

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89. *Criminal Law Amendment Act, 1985*, S.C. 1985, c. 19, s. 64.

(d) that a confession made by one of the accused, if introduced and proved, would prejudice the jury against the other accused; and

(e) that one of the accused could give evidence for the whole or some of the other accused, and would become a compellable witness on the separate trials of such other accused.

Comments

As indicated, the issue of severance presumes that the accused, the charges or both were properly joined at the outset. Under present law, the Crown has complete control over whether to separately or jointly indict offenders. If jointly indicted, an accused has no right to a separate trial, but can only appeal to the trial judge's discretion to grant a separate trial "in the interests of justice." With the solitary exception of section 522 (possession of stolen property), the *Criminal Code* is silent on the joinder or severance of offenders.

The trend is clearly in favour of joint trials, and the general rule is that persons engaged in a common enterprise should be jointly tried unless it can be demonstrated that a joint trial would be unjust to a particular accused, and that this would not be in the interests of justice.[90] The usual grounds considered in an application for severance of accused were laid down in the case of *R.* v. *Weir (No. 4)*;[91] the five non-exclusive grounds set out in our proposal restate those in *Weir*, and permit the court to direct a separate trial where holding a joint trial would work a substantial injustice to an accused. There are undeniable problems of unfairness to the accused resulting from the holding of joint trials. An accused may seek severance from other accused because he wishes to call his co-accused as a witness. No accused person is a compellable witness in his or her own trial. A separately charged accused person may compel the testimony of any other person. However, it should be noted that, under our scheme, the mere fact that one accused wishes to be able to examine another jointly charged accused person may not in itself be sufficient to warrant severance.[92]

We favour the codification of grounds for severance as a means for guiding the court's assessment of what is "in the interests of justice" when considering a motion for severance.

At present subsection 520(3) of the *Criminal Code* provides that severance of counts or accused should be available "where it [the court] is satisfied that the interests of justice so require." Another formulation that may more closely focus on the relevant interest is that used in Rule 14 of the American *Federal Rules of Criminal Procedure*, that severance may be ordered "if it appears that a defendant or the government is

90. Ewaschuk, *supra*, note 3 at 247.

91. (1899), 3 C.C.C. 351 (Qué. Q.B.) [hereinafter *Weir*].

92. Eugene Ewaschuk, "Criminal Pleadings" in Vincent M. Del Buono, ed., *Criminal Procedure in Canada: Studies* (Toronto: Butterworths, 1982) 345 at 377.

prejudiced by a joinder of offenses or of defendants ... or by ... joinder for trial together ....''[93] If greater specificity in the formulation of the rule as we have proposed it is not effected, a *prima facie* right to severance in certain circumstances could supplement our proposals. The existence of a statement by a co-accused implicating the accused is commonly described as conducive to miscarriages of justice, but it is not an automatic basis for separate trials in Canada.[94] However, the Supreme Court of Canada recently recognized the inherent danger to an accused and held that, where the evidence is substantially stronger against one of two conspirators, including a damaging statement by one accused inadmissible against the other, separate trials should be ordered.[95]

In the United States severance is virtually automatic in such cases, based on a belief in the inability of honest jurors, notwithstanding their best efforts, to disabuse themselves of such prejudicial evidence.[96]

XV. Duplicitous Counts

RECOMMENDATION

15. Duplicitous counts should be divided into two counts if the Crown wishes to proceed on both aspects of the count. Alternatively, the Crown should be able to elect which part of the count to proceed upon and the other part could be deleted from the charge document by amendment.

Comments

Duplicity is a recurring problem that should be of little relevance to modern criminal procedure. The issue concerns a count which charges two or more offences. Each count should charge one offence and each offence, where more than one is charged in a single charge document, should be set out in a separate count. Duplicity arises where the wording of a count ostensibly charges more than one offence. Simply counting verbs is not the answer, because a provision creating an offence can provide for different modes of committing what is in essence one offence. The question is whether a count charges essentially one offence in different modes, and is therefore valid, or whether it charges two or more offences and is thus duplicitous (or

93. *Supra*, note 45.

94. *R.* v. *Lane and Ross* (1969), [1970] 1 C.C.C. 196 (Ont. H.C.); *R.* v. *Puffer* (1976), 31 C.C.C. (2d) 81 (Man. C.A.), aff'd as to *McFall* v. *R.* (1979), [1980] 1 S.C.R. 321, 48 C.C.C. (2d) 225.

95. *Guimond* v. *R.* (1979), [1979] 1 S.C.R. 961, 44 C.C.C. (2d) 481, 8 C.R. (3d) 185.

96. Based on *Bruton* v. *U.S.*, 391 U.S. 123 (1968).

multifarious). If it is the latter, there is the further question of what should be the proper judicial response. The importance of the distinction increases if the judicial response will be to quash the charge; however, where duplicity is held not to be fatal, the distinction becomes meaningless.

The dividing line is not easy to draw, as was pointed out by Dickson J. in *Sault Ste. Marie*, where he held that:

> ... the primary test should be a practical one, based on the only valid justification for the rule against duplicity: does the accused know the case he has to meet, or is he prejudiced in the preparation of his defence by ambiguity in the charge?[97]

Our proposals in this area focus on the appropriate response to duplicitous counts. Our suggested approach to this issue is to allow duplicitous counts to be split into two whenever the problem is recognized, if the Crown wishes to proceed on both aspects of the count. Alternatively, the Crown should be able to elect which part of the count to proceed upon and the other part could be deleted from the charge document.[98] Of course, if the issue is raised on appeal, only the latter remedy would be available.

Our requirement that each count specifically refer to an offence section would eliminate most problems. Difficulties may still arise where the section includes more than one offence; however, this proposed provision would eliminate the remaining problems.

XVI. Alternative Counts

RECOMMENDATION

16. Alternative counts should be separated by "or" in the charge document itself.

Comments

This recommendation is largely self-explanatory. If alternative counts are separated by "or" in the charge document itself, this would clearly signal their status to the trier of fact, and would be especially helpful to juries.

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97. *Supra*, note 2 at 1308.

98. This would accord with the views of the Ontario Court of Appeal in *R.* v. *City of Sault Ste. Marie* (1976), 30 C.C.C. (2d) 257, aff'd in *supra*, note 2.

CHAPTER THREE

Summary of Recommendations

The Charge Document

1. A single document, called a "charge document," should be employed throughout the process. The use of the terms "information" and "indictment" should be discontinued. The *Criminal Code* should have a provision identifying and defining the attributes of a charge document and its application.

Rules Applicable to All Charge Documents

2. The same pleading rules should apply both to summary conviction and to indictable offences, if the present scheme for classifying crimes within the *Criminal Code* is maintained.

The Form of the Charge Document

3. (1) The contents of a charge document should be required to be in the following form: style of cause, "Statement of Alleged Crime" and "Details of Alleged Crime," separated into distinct paragraphs.

(2) Ancillary provisions should include the following:

(a) allegations in one count may be incorporated by reference in another;

(b) a count should contain no prejudicial matter (such as an alias) unless necessary to comply with the requirements of law;

(c) a count should contain no surplusage, save that which is relevant, non-prejudicial and necessary in the interest of ensuring a fair trial;

(d) a court may amend a count so as to delete prejudicial averments; a court may also grant necessary ancillary relief such as an adjournment;

(e) where irreparable prejudice has resulted from the inclusion in a count of prejudicial averments, the court should declare a mistrial or quash the count.

(3) Sections 511, 513, 514, 515 and 517 of the *Criminal Code* should be repealed as a consequence of these recommendations.

The Contents of the Charge Document

4. The initial requirements for the contents of a charge document should be legislated to constitute the following:

(a) a charge document must be in writing in Form A (see Appendix B, I);

(b) the present policy of allowing charge documents to cover multiple offences (and accused for that matter) is non-contentious and sound;

(c) each crime charged should be set out in a separate count;

(d) each count should apply to a single transaction; and

(e) each count should contain the following elements:

(i) an allegation of the commission of an identified crime,

(ii) a reference to the statutory authority creating the specific crime,

(iii) a reference to the essential legal elements constituting the crime, and

(iv) sufficient detail of the factual circumstances of the alleged crime to fulfil two purposes: to identify the transaction referred to, and to give the accused reasonable information of the act or omission to be proved against him.

Attempts and Included Crimes

5. Within the structure of the *Criminal Code* as presently constituted, section 587 governing liability for attempts should be retained without change. However, section 588 should be modified to provide that an accused charged with attempt should be convicted of attempt if the evidence establishes the commission of the complete crime, rather than being charged with the complete crime and bearing the expense of a new trial. Ultimately, sections 587 and 588 should be modified along the lines recommended in our Report 30, *Recodifying Criminal Law*, volume 1. In addition, section 589, governing liability for included crimes, should be changed to limit the doctrine of included crimes to those crimes included as a matter of law, and to exclude crimes which may otherwise have been included as a matter of drafting.

Objection to Validity of the Charge Document

6. Objection to a charge document's validity or sufficiency should be taken by motion to quash the charge prior to plea. If an objection is made thereafter without reasonable explanation for the delay, the failure to object prior to plea

without reasonable explanation shall be considered by the court when deciding whether to amend the charge under Recommendation 7, or whether to grant additional relief consequential upon any amendment, such as an adjournment.

Amendments

7. (1) Provisions concerning the validity and sufficiency and amendment of charge documents should provide the following:

(a) amendments should be possible at any time before verdict;

(b) subject to paragraphs (c), (d) and (e) in all cases, a court should be empowered to amend any omission or variance in either the "Statement of Alleged Crime" or "Details of Alleged Crime," whether of substance or form, to comply with the requirements of a valid charge, unless such amendment, with or without other ancillary relief such as the recalling of any witnesses or the granting of an adjournment, would be prejudicial to a fair trial;

(c) a charge document that is unsigned or unsworn may be amended so as to permit its being signed or sworn, as the case may be, unless a time limitation period has expired;

(d) a court should have no power to amend a document that charges no crime known to law; there is said to be no crime known to law when:

(i) there is no statutory provision at all creating the crime,

(ii) there is a statutory provision creating a crime, but it does not encompass the crime charged,

(iii) there is a statutory provision creating the crime charged, but it was not in force at the time the act or omission occurred, or

(iv) the statutory provision creating the alleged crime is unconstitutional (*ultra vires*, invalid or inoperative under the *Charter*);

(e) a court should have no power to amend and thereby charge a different crime;

(f) the factors to be considered by a court in deciding whether or not to make an amendment should be specified, and would include:

(i) the evidence taken at the trial or preliminary hearing, if any,

(ii) all the circumstances of the case and the proceedings,

(iii) whether the accused has been misled or prejudiced in answering the charge, and whether an adjournment or the recalling for further evidence of any witness would cure the prejudice, and

(iv) whether the objection to the charge is being taken before plea or not.

(2) Lack of factual specificity so as to identify the transaction to be proved should give rise to a right in an accused to have an adjournment upon the amendment of such a defect.

Quashing and Amendments on Appeal

8. Provision should be made to allow the following responses by an appeal court to grounds of appeal involving alleged error by the trial court with regard to the validity or sufficiency of counts or charge documents:

(a) inconsequential amendments could be made by the appeal court to clear up the record without the necessity of allowing the appeal;

(b) the appeal court could similarly amend the record without the necessity of allowing the appeal where the defect is more serious but relates to a factual issue that was tried and determined at trial in all respects as if the defect in the charge had not been present or the proper amendment had been made; and

(c) in all other situations where the charge document could have been amended by the trial court, the appeal court would be empowered to amend a count or charge document if to do so would be in the interests of justice; alternatively, the appeal court should be empowered to quash the conviction without necessarily ordering a new trial or entering an acquittal.

Particulars

9. (1) The trial judge may order particulars further describing any matter relevant to the charge.

(2) The legal effect of a particular is the same as if it had been included in the charge as originally drafted. If the matter particularized is not essential to constitute the crime, it is to be treated as surplusage and need not be proved in order to secure a conviction.

Appearance of Joint Accused on a Charge Document

10. Joint accused should appear on a charge document in alphabetical order. In addition, the defence should have the right to reorder cross-examination and defences on agreement among themselves without consent of the Crown or the court.

Provisions Governing Joinder of Accused and Counts

11. Express provisions should state when joinder of accused and counts is permissible. The elements of the applicable rules should be some or all of the following:

(a) crimes may be joined as counts in a charge document if

(i) they arise from the same transaction,

(ii) they are part of a series of crimes of similar character (evidence of each of which is admissible in proof of the others; this would be consistent with the general relationship between issues of severance and similar fact evidence),

(iii) they are part of a common scheme or plan, or

(iv) they are so closely connected in time, place and occasion that it would be difficult to separate proof of one from proof of the other(s); and

(b) offenders may be jointly charged in a charge document or count thereof if:

(i) they participated in the same transaction on which the charge or charges are based,

(ii) they participated in a common scheme or plan, or

(iii) they are charged with crimes which are so closely connected in time, place and occasion that it would be difficult to separate proof of one from proof of the other(s).

Joinder of Charge Documents

12. A court should, in the interests of justice, be empowered to order two or more charge documents to be tried together if the alleged crimes and the accused persons (if there are multiple accused) could have been joined in a single charge document in the first instance, or if the accused or accused persons consent and the court concurs. The procedure would then be the same as if the prosecution were under a single charge document. Joinder should only be granted where the accused has consented to the trial of both matters in a forum without a jury and without a preliminary inquiry. Indictable offence procedural requirements should govern in the event of any conflict as to applicable procedure.

Joinder of Other Charges with Murder

13. It is recommended that section 518 of the *Criminal Code*, regarding joinder of another charge with murder, be amended to allow the joinder of the crimes of manslaughter, attempted murder or criminal negligence causing death. Furthermore, in the interests of justice, any juryable crime could be joined with the consent of the accused.

Severance of Accused and Counts

14. A court should be empowered to grant severance of accused or counts that are jointly charged in the interests of justice. The statutory test for severance should be set out. In assessing the interests of justice the court may consider the following grounds:

(a) that the accused have antagonistic defences;

(b) that important evidence in favour of one of the accused, which would be admissible on a separate trial, would not be allowed on a joint trial;

(c) that evidence which is inadmissible against one accused is to be introduced against another, and that this would prejudice the jury toward the former;

(d) that a confession made by one of the accused, if introduced and proved, would prejudice the jury against the other accused; and

(e) that one of the accused could give evidence for the whole or some of the other accused, and would become a compellable witness on the separate trials of such other accused.

Duplicitous Counts

15. Duplicitous counts should be divided into two counts if the Crown wishes to proceed on both aspects of the count. Alternatively, the Crown should be able to elect which part of the count to proceed upon and the other part could be deleted from the charge document by amendment.

Alternative Counts

16. Alternative counts should be separated by "or" in the charge document itself.

APPENDIX A

Glossary

The area of criminal procedure is replete with technical and esoteric terms. Since a discussion of the subject necessarily involves use of that terminology, a glossary is inserted here for the benefit of the reader.

Amendment: a correction, addition or deletion to a charge document.

Charge: the substantive offence contained in an information or indictment; often used interchangeably with ''count''; also, a generic term often used in common parlance as a substitute for the technical terms ''information'' and ''indictment.''

Count: the several distinct parts, like paragraphs, in an information or indictment, each of which charges a criminal offence and which would be sufficient by itself to constitute an information or indictment.

Defect of Form: an imperfection in the style, manner, arrangement of an information or indictment, or non-essential parts of an information or indictment, as distinguished from a ''defect of substance.''

Defect of Substance: an imperfection in the body or substantive part of an information or indictment, consisting of the omission of something which is essential to be set forth, such as the omission of an essential averment.

Direct Indictment: an initiating charge document requiring an accused to stand trial in the court named without a preliminary inquiry or where the accused has been discharged at a preliminary inquiry, requiring him to stand trial in any event; sometimes referred to as a ''direct-line'' indictment or a ''preferred indictment.''

Duplicity: the technical fault of combining two offences in the same charge or count of an information or indictment; similar to ''multiplicity'' (see ''Multifarious or Multiplicitous'').

Essential Averments: those assertions of fact which are essential to successful prosecution and which must be proved at trial, such as the date, time and place of the offence.

Included Offence: a lesser offence which is part of another greater or more serious offence and is established by proof of the same or fewer facts, or a less culpable mental state, or both, than that which is required to establish the offence charged. Characteristically, proof of the lesser included offence is required in order to prove the greater offence. Hence, robbery requires proof of the lesser offences of theft and assault. Under the doctrine of included offences, on a prosecution for robbery, a failure to prove theft will nevertheless expose the accused to conviction for the lesser, included offence of assault.

Indictment: one of two forms of charge documents (the other being the information) presently authorized under the *Criminal Code*; it is an accusation in writing of a serious (that is, indictable) offence and is brought in the name of Her Majesty the Queen. Typically it is a document used only after an accused has been committed to stand trial following a preliminary inquiry, but it may also be employed in the absence of a preliminary inquiry or where the accused has been discharged at the preliminary inquiry. In the latter two cases it is referred to as a ''direct indictment'' or a ''preferred indictment.''

Information: one of two charge documents (the other being the indictment); it is an allegation taken before a justice, in writing and under oath, that a person or persons have committed a criminal offence; also, the document upon which proceedings are commenced which subsequently may be superceded by an indictment.

Issuance of Process: a writ, subpoena, warrant or similar document is said to be ''issued'' when it is presented to the proper officer of the court by the party seeking to have it issued, and has been authenticated by such officer and returned to the party; ''process'' refers to the compelling nature of the document.

Joinder of Accused: the charging of two or more persons in the same charge document.

Joinder of Offences: the charging of two or more offences in a charge document containing a separate count for each offence charged.

Multifarious or Multiplicitous: similar to ''duplicitous'' but involving more than two offences in one count.

Nullity: literally, a ''nothing''; no proceeding; an act or proceeding which is taken as having absolutely no legal force or effect, as though it had never taken place.

Particulars: Where satisfied that it is necessary for a fair trial, a court may, in proceedings on indictment, order the prosecutor to furnish details or particulars of the act or omission and transaction referred to in the charge. Similarly, in summary conviction proceedings the court may order further particulars describing any matter relevant to the proceedings. The purpose of particulars is to

supplement a charge which, although otherwise sufficient, is inadequate for the accused properly to prepare his defence or to ensure him a fair trial. Particulars also serve to define the issues in the case and thus assist the trial judge in ruling on the admissibility of evidence.

Pleadings: in criminal and civil cases, statements in writing served by each party on the other, and filed with the court, stating the facts relied on to support their case and including all essential averments. The primary pleading in a criminal case is the charge document, either the information or the indictment.

Preferred Indictment: a charge document, subsequent to the initial charge document, requiring an accused to stand trial. An indictment is "preferred" once an accused has been committed to stand trial following a preliminary inquiry. The term is also commonly used to refer to the documents on which the accused is to stand trial after he has been discharged at a preliminary inquiry; such an indictment may only be "preferred" by the Attorney General or with consent of the court. Used in this latter sense the expression "preferred indictment" is synonymous with "direct indictment."

Preliminary Inquiry: a proceeding before a justice, magistrate or provincial court judge for an indictable offence for the purpose of determining whether there is sufficient evidence to put the accused on trial.

Procedure on Indictment: procedure applicable to more serious crimes called indictable offences.

Severance of Accused: the ordering of separate trials for accused persons jointly charged.

Severance of Offences: the ordering of separate trials for offences contained in one charging document.

Single Transaction Rule: The *Criminal Code* requires that each count of an information or indictment must be set out in a separate paragraph and shall in general refer to a single transaction. For policy reasons, the term has come to mean more than merely an incident or occurrence, and depending upon circumstances, a single transaction may involve multiple victims or incidents. Thus, a single transaction may validly encompass a number of occurrences (incidents) if they are related or closely connected in time and place. Examples of validly charged single transactions include the theft of several articles by one or more accused persons or sexual attacks perpetrated by one offender against the same victim.

Summary Conviction Procedure: the procedure applicable to the summary trial of less serious crimes called summary conviction offences; the applicable procedure is found in Part XXIV of the *Criminal Code*.

Surplusage: assertions of facts in a charge document which are not essential to successful prosecution and which need not be proved at trial.

Variance: a discrepancy or disagreement between allegations (in an information or indictment or count therein) and the evidence or proof thereof.

APPENDIX B

Forms

I. Proposed Form for Charge Document

FORM A
Charge Document

Canada,
Province of _____,
(*territorial division*) _____

In the (*set out name of the court, where applicable*)

Her Majesty the Queen

against

(*name of accused*)

Statement of Alleged Crime

(*Specify the crime charged and state the section number and applicable federal statute. Use separate paragraphs for each additional or alternative count.*)

Details of Alleged Crime

(*State such details as the date, time, place, method and circumstances of the alleged crime.*)

(*Complete either section 1 or section 2, below.*)

1. The informant, C.D. of _____, (*occupation*), has reasonable grounds to believe and does believe that the accused committed the alleged crime(s) in the manner set out above.

Sworn before me _____
this _____ day of _____
A.D. _____, at _____

_____
(*Signature of Informant*)

A Justice of the Peace in and
for

2. The accused stands charged of the alleged crime(s).

Dated this _____ day of _____ A.D. _____, at _____

_____
(*Signature of signing officer, agent of Attorney General, etc., as the case may be*)

Note: The date of birth of the accused may be mentioned on the charge document.

II. Current Forms for Charge Documents

FORM 2
INFORMATION (Sections 455, 455.1 and 723)

Canada,
Province of _____,
(*territorial division*) _____

This is the information of C.D., of _____, *(occupation)*, hereinafter called the informant.

The informant says that *(if the informant has not personal knowledge state that he has reasonable and probable grounds to believe and does believe and state the offence).*

Sworn before me _____
this _____ day of
_____ A.D. _____,
at _____.

_____
Signature of Informant

_____
A Justice of the Peace in and
for

Note: The date of birth of the accused may be mentioned on the information or indictment.

FORM 4

HEADING OF INDICTMENT (Sections 496, 509 and 520)

Canada,
Province of _____,
(territorial division) _____

In the *(set out name of the court)*

Her Majesty the Queen
against
(name of accused)

(Name of accused) stands charged

1. That he *(state offence)*.
2. That he *(state offence)*.

Date this _____ day of _____ A.D. _____, at _____

_____

(Signature of signing officer, agent of Attorney General, etc., as the case may be)

Note: The date of birth of the accused may be mentioned on the information or indictment.